UNITARIAN UNIVERSALIST WOMEN'S FEDERATION
(Biennial Convention, 1975,
reaffirmed 1979, 1981)

The Unitarian Universalist Women's Federation reaffirm[s] the right of any woman of any age or marital or economic status to have an abortion at her own request upon consultation with her physician.

UNITED CHURCH OF CHRIST
(General Synod, 1961)

The question of when life [personhood] begins is basic to the abortion debate. It is primarily a theological question, on which denominations or religious groups must be permitted to establish and follow their own teachings.

Every woman must have the freedom of choice to follow her personal and religious and moral convictions concerning the completion or termination of her pregnancy.

UNITED METHODIST CHURCH
(General Conference, 1976, 1984)

When an unacceptable pregnancy occurs, a family, and most of all the pregnant woman, is confronted with the need to make a difficult decision. We believe that continuance of a pregnancy which endangers the life or health of the mother, or poses other serious problems concerning the life, health, or mental capability of the child to be, is not a moral necessity. In such a case, we believe the path of mature Christian judgment may indicate the advisability of abortion. We support the legal right to abortion as established by the 1973 Supreme Court decisions. We encourage women in counsel with husbands, doctors, and pastors to make their own responsible decisions concerning the personal or moral questions surrounding the issue of abortion. (Resolution on Responsibile Parenthood, 1976).

Our belief in the sanctity of unborn human life makes us reluctant to approve abortion. But we are equally bound to respect the sacredness of the life and well-being of the mother, for whom devastating damage may result from an unacceptable pregnancy. In continuity with past Christian teaching, we recognize tragic conflicts of life with life that may justify abortion (Social Principles, 1984).

UNITED METHODIST CHURCH,
NATIONAL YOUTH MINISTRY ORGANIZATION
(Biennial Convocation, 1983)

Freedom of choice in problem pregnancies must be based on the moral judgment of the involved individuals.

Where there is no consistent medical, ethical, or theological consensus, the U.S. Constitution should not be used to force one theological view on all citizens who may believe otherwise.

The U.S. Supreme Court decision of Roe

v. Wade in 1973 guarantees a woman the right to make a personal decision regarding termination of a pregnancy. Any amendment to deconstitutionalize the issue of abortion and invalidate the 1973 decision could set a precedent for endangering all our civil liberties.

UNITED METHODIST CHURCH, WOMEN'S CHURCH, GENERAL BOARD OF GLOBAL MINISTRIES (1975, reaffirmed 1979, 1980)

We believe deeply that all should be free to express and practice their own moral judgment on the matter of abortion. We also believe that on this matter, where there is no ethical or theological consensus, and where widely differing views are held by substantial sections of the religious community, the Constitution should not be used to enforce one particular religious belief on those who believe otherwise.

UNITED PRESBYTERIAN CHURCH IN THE U.S.A.
(General Assembly, 1972,
reaffirmed 1978)

Whereas, God has given persons the responsibility of caring for creation as well as the ability to share in it, and has shown his concern for the quality and value of human life; and

Whereas, sometimes when the natural ability to create life and the moral and spiritual ability to sustain it are not in harmony, the decisions to be made must be understood as moral and ethical ones and not simply legal;

Therefore, in support of the concern for the value of human life and human wholeness...the 184th General Assembly:

b. Declares that women should have full freedom of personal choice concerning the competion or termination of their pregnancies bnd that artificial or induced termination of pregnancy, therefore, should not be

restricted by law, except that it be performed under the direction and control of a properly licensed physician.

UNITED SYNAGOGUE OF AMERICA
(Biennial Convention, 1975)

"In all cases 'the mother's life takes precedence over that of the foetus' up to the minute of its birth. This is to us an unequivocal principle. A threat to her basic health is moreover equated with a threat to her life. To go a step further, a classical responsum places danger to one's psychological health, when well established, on an equal footing with a threat to one's physical health." (1967)

(A)bortions, "though serious even in the early stages of conception, are not to be equated with murder, hardly more than is the decision not to become pregnant."

The United Synagogue affirms once again its position that "abortions involve very serious psychological, religious, and moral

problems, but the welfare of the mother must always be our primary concern."

WOMEN OF THE EPISCOPAL CHURCH
(Triennial Meeting, 1973)

WHEREAS the Church stands for the exercise of freedom of conscience by all and is required to fight for the right of everyone to exercise that conscience, THEREFORE, BE IT RESOLVED that the decision of the U.S. Supreme Court allowing women to exercise their conscience in the matter of abortion be endorsed by the Church.

WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM
(Biennial Convention, 1982)

Reverence for life is the cornerstone of our Jewish heritage. Since abortion in Jewish law is primarily for the mother's physical or mental welfare we deplore the burgeoning casual use of abortion. Abortion should be "legally available, but ethically restricted. Though the abortion of a fetus is not equivalent to taking an actual life,

it does represent the destruction of potential life and must not be undertaken lightly...."

However, Women's League also believes that the practice of the principle of the separation of church and state guaranteed by our Constitution has kept our nation strong and preserved full freedom for the individual. Women's League believes that transmitting religious values is the responsibility of the religious sector.

YOUNG WOMEN'S CHRISTIAN
ASSOCIATION OF THE U.S.A.
(1979)

As an organization rooted in the Christian faith, the YWCA is deeply conscious of the difficult personal and ethical choices raised by the issue of abortion.

The position of the YWCA is not "pro-abortion." It is a position supporting a woman's right to make an individual decision based upon her own religious and

ethical beliefs and her physician's guidance. The answer to the question, "When does personhood begin?" must remain in the ethical and religious realm.

Since there is a wide variation of opinion among religious groups and individuals in our pluralistic society as to when personhood begins and what an ethical decision on abortion may be in different circumstances, the YWCA holds that no one religious belief should be mandated by law. Our government is expressly comManded to make no law establishing any one religion or prohibiting free expression of religion.

APPENDIX D

A CALL TO CONCERN
(Signed by 220 American religious ethicists in 1978)

The increasing urgency of the issue of abortion rights requires us as teachers and writers of religious ethics to speak out.

Abortion is a serious and sometimes tragic procedure for dealing with fetal life. It raises important ethical issues and cannot be blandly legitimized by the mere whim of an individual. Nevertheless, it belongs in that large realm of often tragic sctions where circumstances can render it a less destructive procedure than the rigid prolongation of pregnancy.

We support the Supreme Court decisions of 1973 which had the effect of removing abortion from the criminal law codes. The Court did not appeal to religion or ethics in arriving at its judgment, but we believe the

decision to have been in accord with sound ethical judgment. Taking note of the fact that theologians, as well as other experts, disagree on the fundamental moral question of when life begins, the Court decided that the law ought not to compel the conscience of those WHo believe abortion to be in harmony with their moral convictions.

In the last four years, however, those decisions have been subjected to a relentless attack from those who take the absolutist position that it is always wrong to terminate a pregnancy at any time after the moment of conception. Those who take this absolutist position have not hesitated to equate abortion at any stage of pregnancy with murder or manslaughter. From such an extreme viewpoint, all legal means are considered justified if they limit abortion, no matter what the human consequences for poor women and others--as in the recent efforts to deny

Medicaid funds and to prohibit use of public hospitals for abortion services.

We feel compelled to affirm an alternative position as a matter of conscience and professional responsibility.

1. The most compelling argument against the inflexibility of the absolutist position is its cost in human misery. The absolutist position does not concern itself about the quality of the entire life cycle, the health and well-being of the mother and family, the question of emotional and economic resources, the cases of extreme deformity. Its total preoccupation with the status of the unborn renders it blind to the well-being and freedom of choice of persons in community.

2. "Pro-life" must not be limited to concern for the unborn; it must include a concern for the quality of life as a whole. The affirmation of life in Judeao-Christian ethics requires a commitment to make life

healthy and whole from beginning to end. Considering the best medical advice, the best moral insight, and a concern for the total quality of the whole life cycle for the born and the unborn, we believe that abortion may in some instances be the most loving act possible.

3. We believe it is wrong to deny Medicaid assistance to poor women seeking abortions. This denial makes it difficult for those who need it most to exercise a legal right, and it implies public censure of a form of medical service which in fact has the moral support of major religious groups.

4. We are saddened by the heavy institutional involvement of the bishops of the Roman Catholic Church in a campaign to enact religiously-based anti-abortion commitments into law, and we view this as a seirous threat to religious liberty and freedom of conscience. We acknowledge the

legal right of all individuals and groups, both religious and secular, to seek laws that reflect their religious and ethical beliefs. But the institutional mobilization of Roman Catholic dioceses, including massive financial contributions by those dioceses to the National Committee for a Human Life Amendment, is inappropriate on this issue. If successful, it would violate the deeply held religious convictions of individual members and official bodies of many other religious groups about when human personhood begins, the relative rights of a woman and a fetus, and responsible family life. This is particularly a problem when there is no clear majority opinion on these fundamental issues nor an adequate social base of consensus for legitimate and enforceable legislation.

5. <u>We call upon the leaders of religious groups supporting abortion rights to speak out more clearly and publicly in</u>

response to the dangerously increasing influence of the absolutist position. There may be some ecumenical risks in such candor, but those risks have already been assumed by those who have pressed the absolutist position on religious grounds. In the long run, the true test of ecumenical authenticity is the ability to sustain dialogue and friendship in spite of very sharp disagreements on matters of substance.

Nos. 84-495 and 84-1379

IN THE

Supreme Court of the United States

October Term, 1985

RICHARD THORNBURGH, *et. al.*,
Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*,
Appellees.

EUGENE F. DIAMOND, *et al.*,
Appellants,

v.

ALLAN G. CHARLES, *et al.*,
Appellees.

On Appeal from the United States Courts of Appeals for the Third and Seventh Circuits

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

Interest of *Amicus Curiae*

Robert Abrams, as Attorney General of the State of New York, submits this brief as *amicus curiae* pursuant to Supreme Court Rule 36.4.

Since 1970, the State of New York has recognized that the right of privacy incorporates the right of a woman to choose to terminate her pregnancy up to the point of viability, subject to reasonable restrictions calculated to protect the health and safety of the woman. *Byrn* v. *New York City Health & Hospitals Corp.*, 31 N.Y. 2d 194 (1972); N.Y. Penal Law § 123.05(3). This Court likewise recognized, in 1973, that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973).

If *Roe* v. *Wade* were to be overruled, as urged by the Solicitor General,* and New York were to adhere to its tradition of recognizing the right of a woman to choose to have an abortion, New York and other states choosing to uphold such a right would be faced with meeting an enormous demand for the service from out-of-state residents. The magnitude of this demand would be extraordinary, given the wide acceptance of and reliance upon abortion since *Roe v. Wade* was decided.

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* The brief submitted by the Solicitor General as *amicus curiae* will be cited as "S.G. at ——."

In explicitly recognizing that the right to choose to have an abortion is implicit in the right of privacy protected by our Constitution, this Court guaranteed that its exercise, as with the exercise of other constitutionally protected rights, would not be dependent upon the vicissitudes of political controversy. *See Engel* v. *Vitale*, 370 U.S. 421, 429-30 (1962); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943). The decision whether to obtain an abortion, as with other deeply personal choices regarding privacy and reproductive decisions intertwined with religious and moral beliefs, is precisely the type of right most in need of such explicit constitutional protection. New York has aggressively protected its citizens from attacks upon these rights in the past, and therefore submits this brief *amicus curiae* in response to that submitted by the Solicitor General urging this Court to overrule *Roe* v. *Wade*.

Statement of the Cases

In *Thornburgh* v. *American College of Obstetricians and Gynecologists*, No. 84-495, the Court of Appeals for the Third Circuit held unconstitutional sections of a Pennsylvania law requiring that the method of abortion used be one that would most likely result in a live birth, even if it would cause greater (though not significantly greater) risk to the mother; that a second doctor be present for all post-viability abortions even if a medical emergency dictates an immediate abortion; that certain information be provided to a patient before an abortion is performed, for the purpose, as the court found, of dissuading the woman from having an abortion, regardless of whether the woman's physician deems the information relevant to her decision; and that fa-

cilities providing abortion services file detailed reports subject to public disclosure. The court also enjoined operation of a provision that required a minor seeking an abortion to obtain parental consent or a court order, on the ground that no safeguards had been adopted to ensure that the judicial alternative would be expeditious and would protect the minor's confidentiality.

In *Diamond* v. *Charles*, No. 84-1379, the Court of Appeals for the Seventh Circuit held unconstitutional a section of Illinois law that made it a felony to fail to conform to a specified standard of care in performing an abortion, and thereby to cause the death of a viable fetus, finding that the provision failed to afford due deference to the viability determination of the attending physician and was impermissibly vague. A similar provision as to "possibly viable" fetuses was held unconstitutional because it ran afoul of *Roe* v. *Wade*'s holding that the State does not have a compelling interest in protecting fetuses unless they are actually viable. The Seventh Circuit also struck down a requirement that physicians inform women that certain birth control methods are "abortifacients," defined as any substance or device known to cause fetal death. A fetus is in turn defined to include a fertilized cell, thus making an intrauterine device, and other common means of birth control, abortifacients. The lower court held that the statute impermissibly imposed the State's theory of when life begins upon the physician and the patient.

None of the parties in these two cases urged that *Roe* v. *Wade* be overruled. Indeed, both cases have been consistently briefed and argued within the framework established by *Roe* v. *Wade* and subsequent cases. *E.g., City of Akron*

v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). The Department of Justice is not a party to either case. Nonetheless, the Solicitor General has taken the extraordinary step of using these two cases to urge the Court to perform an unprecedented *volte-face*. The Government asks that the right to choose to have an abortion be repudiated and that an independent right of privacy, on which the right of abortion is based, be eliminated from the freedoms protected by our Constitution.

Summary of Argument

The Solicitor General's arguments are without merit. They ignore a firmly established line of precedent protecting our rights to be left alone by government, to choose how to conduct our own lives, and to decide for ourselves when and whether to marry or to conceive or bear children. *E.g., Loving* v. *Virginia*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Moreover, they disregard the important principle of *stare decisis*, a principle recognized by this Court in this very context just two years ago. *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983). Finally, they ignore the very real likelihood of social and political chaos should this Court overrule *Roe* v. *Wade*.

ARGUMENT

Only twelve years ago, this Court held that the right of personal privacy—which finds its doctrinal sources in decisions dating back to the nineteenth century—"is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973). The Court has adhered to this principle in no fewer than twelve cases in the ensuing years.* Because this Court has consistently and repeatedly followed its decision, the right recognized in *Roe* has become not only a part of our constitutional landscape, but an element widely perceived to be part of the nation's social fabric.

The reasons for adhering to *stare decisis*, generally and in this context, are manifold. Among them are

> the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments.

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). Even as to constitutional questions, "any depar-

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* *See, City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983); *Simopoulos* v. *Virginia*, 462 U.S. 506 (1983); *H.L.* v. *Matheson*, 450 U.S. 398 (1981); *Harris* v. *McRae*, 448 U.S. 297 (1980); *Bellotti* v. *Baird*, 443 U.S. 622 (1979); *Colautti* v. *Franklin*, 439 U.S. 379 (1979); *Maher* v. *Roe*, 432 U.S. 464 (1977); *Beal* v. *Doe*, 432 U.S. 438 (1977); *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Connecticut* v. *Menillo*, 423 U.S. 9 (1975).

ture from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, —— U.S. ——, ——, 104 S.Ct. 2305, 2311 (1984). For "in a society governed by the rule of law," the doctrine of *stare decisis* "demands respect." *Solem* v. *Helm*, 463 U.S. 277, 311 (1983) (Burger, C.J., dissenting), *quoting City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. at 419-20.

Undoubtedly, the passions, both moral and political, which surround the abortion debate have motivated some to counsel the Court to depart from recent decisions. Passionate debate, however, attends many issues which implicate constitutional concerns, and its tenacity surely cannot be an acceptable basis for abjuring reasoned adherence to announced principles. Only by "circumspect observance" of the principle of *stare decisis* "can the wisdom of this Court as an institution transcending the moment . . . be brought to bear on the difficult problems that confront [it]." *Green* v. *United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting). *See Oregon* v. *Kennedy*, 456 U.S. 667, 691-92 n. 34 (1982) (Stevens, J., concurring).

Indeed, this Court only two years ago found "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe* v. *Wade*." *Akron*, 462 U.S. at 419-20 n.1. Among them were the special consideration afforded the issues in *Roe*, and the repeated adherence in subsequent cases to the basic principle there announced. *Id.* No doctrinal development has appeared since *Roe* v. *Wade*, much less *Akron*, that in any sense diminishes the Court's conclusion that the right to privacy encompasses the right of a woman to choose whether to terminate a pregnancy.

Each of the so-called "textual, historical, and doctrinal" flaws of *Roe* v. *Wade* decried by the Solicitor General, S.G. at 2, was identified by the dissenters in *Roe* and rejected by the Court. Thus, it was argued that the historical coincidence of the passage of laws criminalizing abortion with the passage of the Fourteenth Amendment supports the contention that the Amendment was not intended to restrict such legislative action, 410 U.S. at 174-77 (Rehnquist, J., dissenting); that the right of privacy, as previously identified by the Court, had no application in the abortion area, *id.* 172-73; and that barring state legislatures, as a matter of constitutional law, from entering into the area of procreative choice, in the absence of textual support, amounted to judicial legislation and usurpation of majoritarian prerogatives, *id.*; *Doe* v. *Bolton*, 410 U.S. 179, 221-23 (1973) (White, J., dissenting) The Solicitor General brings nothing new to the arguments, and cites not one case decided since *Roe* in support of them.

Since *Roe* v. *Wade*, the Court has been called to delineate more fully the fundamental right to choose an abortion. In varying factual circumstances, it has had to weigh the states' competing interests in protecting maternal health and in the future health of the fetus. The continuing need for the Court to furnish guidance in this area does not, however, argue for a doctrinal retraction of *Roe* v. *Wade*. Constitutional adjudication of rights secured by the Bill of Rights often involves difficult tasks of redefinition and line drawing. Obviously, individual rights cannot be jettisoned merely because their application in varrying contexts may be difficult. To cite but one example, for more than a generation this Court has wrestled with the question of religious observances in the public schools, *see Wallace* v.

Jaffree, —— U.S. ——, 105 S.Ct. 2479 (1985), without retreating from the principles announced in *Engel* v. *Vitale*, 370 U.S. 421 (1962).

Both the states and countless individuals have relied upon the rights secured by *Roe* v. *Wade* and its progeny in ordering their affairs and lives. Based on these decisions, states have attempted to establish a uniform framework within which health planning and regulatory decisions can be made. *See e.g., Westchester Women's Health Organization, Inc.* v. *Whalen*, 475 F. Supp. 734 (S.D.N.Y. 1979) (state licensing regulations for ambulatory care clinics providing abortion services are within the guidelines enunciated by this Court); *Roman Catholic Diocese* v. *New York State Department of Health*, —— A.D.2d ——, 490 N.Y.S.2d 636 (3d Dept. 1985) (New York relied on *Akron* in deciding to approve the addition of abortion services to two family planning out-patient clinics); *Schulman* v. *New York City Health & Hospitals Corp.*, 38 N.Y.2d 234 (1975) (reporting requirements of the New York City Health Code within the strictures of *Roe* v. *Wade*).

The overruling of *Roe* v. *Wade* would impose an extraordinary burden upon those states which would continue to allow women to choose to terminate their pregnancies in the face of decisions by other states not to do so. For example, when New York amended its penal law in 1970 to permit licensed physicians to provide abortion services for any consenting woman less than twenty-four weeks pregnant, N.Y. Penal Law § 125.05(3), the State was flooded with women seeking this service.* The magnitude of the burden

* During the first fifteen months after this liberalized bill became effective, 64.5 percent of the abortions performed in New York City were performed on non-residents. Guttmacher, *The Genesis of Lib-*

(footnote continued on next page)

that would be imposed upon New York should *Roe* v. *Wade* be rejected would be all the greater than it was in 1970, given the increased acceptance of abortion in our society and the increased demand for it since *Roe* v. *Wade* was decided.

Individuals have relied upon the right of privacy, which encompasses the right to choose to have an abortion, in planning their families and controlling their destinies. If *Roe* v. *Wade* is overruled, as the Solicitor General urges, and the fundamental right of privacy called into question, an individual's ability to plan when to have children, and to insure that each child is a wanted child, will be left largely to chance, depending upon the state in which one resides, the latest election or whether one is rich or poor.

As with the school prayer issue, the continuing controversy over the right to an abortion makes it clear that such an important right cannot be left to shifting political majorities.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, and free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

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eralized Abortion in New York, 23 Case W. Res. L. Rev. 756, 766 (1972). During the first twelve months alone, approximately 55,000 women from eight states alone—New Jersey, Ohio, Michigan, Illinois, Pennsylvania, Florida, Massachusetts and Connecticut—traveled to New York City to obtain legal abortions. *Id.*

West Virginia State Board of Education v. *Barnette*, 319 U.S. at 638; *see Engel* v. *Vitale*, 370 U.S. at 429-30.* Any decision undercutting *Roe* v. *Wade* and its underlying principles would make it impossible for "citizens [to] have confidence that the rules on which they rely in ordering their affairs . . . , are rules of law and not merely the opinions of a small group of men who temporarily occupy high office." *Florida Department of Health* v. *Florida Nursing Home Association*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) (footnote omitted).

In deciding *Roe* v. *Wade*, the Court confronted the need to give meaning to the concept of due process, a concept that "has not been reduced to any formula; its content cannot be determined by reference to any code." *Poe* v. *Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). Aware that "liberty" is not merely "a series of isolated points pricked out" in terms of guarantees of the Bill of Rights,

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* The New York Legislature, for example, repealed New York's abortion statute in 1972, but then Governor Rockefeller vetoed the repeal, reminding the Legislature of the Report of the Governor's Commission Appointed to Review New York State's Abortion Law (March 1968), which found that "the then-existing, 19th century, near-total prohibition against abortion was fostering hundreds of thousands of illegal and dangerous abortions. . . . discriminating against women of modest means. . . . , promoting hypocrisy and, ultimately, human tragedy. . . . I can see no justification now for repealing this reform and thus condemning hundreds of thousands of women to the dark age once again." Governor's Veto Messages, 1972, *reprinted* in N.Y.S. Legis. Annual-1972, at 423. Significantly, Governor Rockefeller noted,

> the extremes of personal vilification and political coercion brought to bear on members of the Legislature raise serious doubts that the votes to repeal the reforms represented the will of the majority of the people of New York State. The very intensity of this debate has generated an emotional climate in which the very truth about abortions and about the present State abortion law have become distorted almost beyond recognition.

Id.

id., at 543, the Court proceeded to fill out the "vague contours of the Due Process Clause," *Rochin* v. *California*, 342 U.S. 165, 170 (1952),* mindful that its judgment could not be rooted in "personal and private notions," and that it must exercise its judgment "upon interests of society pushing in opposite directions." *Id.*, at 171.**

The constitutional terrain described in *Roe* v. *Wade* is an area in which the Court, in a series of decisions, long ago marked out a "zone of privacy created by several fundamental constitutional guarantees," *Griswold* v. *Connecticut*, 381 U.S. at 485, in matters relating to child rearing, mar-

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* Though confessing that the words of the Due Process Clause "do not interpret themselves," S.G. at 24, and that the provision does not merely prohibit the government from "actually taking hold of a person, as to confine him, without fair procedures," S.G. at 25, the Solicitor General would limit the meaning of liberty to those protections expressly guaranteed by the Bill of Rights. This view of the Due Process Clause, fully accepted by only one member of the Court, *see Griswold* v. *Connecticut*, 381 U.S. at 507-27 (Black, J., dissenting), was rejected even by the Justices dissenting in *Roe* v. *Wade*. *See Griswold* v. *Connecticut*, 381 U.S. at 502-07 (White, J., concurring); *Roe* v. *Wade*, 410 U.S. at 172-73 (Rehnquist, J., dissenting).

** It is neither illogical nor "demoralizing," S.G. at 25, that the Court, at the same time it has refrained from invalidating legislation aimed at curing social evils arising out of industrial life, *e.g. West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937), has shown special solicitude for *personal* freedom "implicit in the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). This responds to an observable distinction between state intrusions upon such "economic freedoms" as the ability to pay substandard wages and state intrusions into time-honored, intimate relationships and decisions. Thus, it has long been recognized that "in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

riage and procreation.* A repudiation of the principles announced in *Roe* v. *Wade* would therefore also remove the constitutional girders of some of this Court's most important decisions in this century.

In *Meyer* v. *Nebraska*, 262 U.S. 390 (1923), for example, the Court struck down under the Due Process Clause a statute that prohibited the teaching of foreign languages to children. It found that the state had intruded into a protected liberty interest because the legislation "materially . . . interfere[d] . . . with the power of parents to control the education of their own." *Id.* at 401. In *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), the Court invalidated a state law requiring parents to send children to public, rather than parochial, school because the legislation "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children under their control." *Id.* at 534-35. These decisions recognized that the Due Process Clause protects a "private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U.S. 158,

* As this Court stated in *Roe* v. *Wade*, 410 U.S. at 152:

> In a line of decisions . . . going back perhaps as far a *Union Pacific R. Co.* v. *Botsford*, 141 U.S. 250, 251 (1891), the Court has recognized that a right of privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, *Terry* v. *Ohio*, 392 U.S. 1, 8-9 (1968); *Katz* v. *United States*, 389 U.S. 347, 350 (1967); *Boyd* v. *United States*, 116 U.S. 616 (1886); *see Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, *Griswold* v. *Connecticut*, 381 U.S. at 484-485; in the Ninth Amendment; *id.*, at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, *see Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923).

166 (1944);* *Poe* v. *Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting).

So, too, has the Court scrutinized and invalidated state legislation encroaching on the ability of citizens to marry. *Loving* v. *Virginia*, 388 U.S. 1 (1967). In *Loving*, the Court reversed convictions under a statute that made inter-racial marriage a criminal offense. While the Court held that the statute was invalid because it violated the "central meaning of the Equal Protection Clause," *id.* at 12, the Court relied equally on the Due Process Clause when it held the statute invalid, finding that it deprived persons of the freedom to marry, "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.* *See Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978).

In *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942), the Court struck down a state statute authorizing the sterilization of repeated felons, characterizing the ability to procreate as "one of the basic civil rights of man." *Id.*, 316 U.S. at 541.** In *Griswold*, the Court recognized that, just as the state cannot terminate the right to bear children, it cannot invade marital relationships to require couples to bear children by

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* Contrary to the view of the Solicitor General, S.G. at 29, the state regulation under review in *Prince* involved not only restriction on freedom of religion, but, as the Court observed, encroachment on the separate and distinct "rights of parenthood." 321 U.S. at 166.

** *Skinner* cannot be characterized as only an equal protection case. It is an axiom of equal protection analysis that a statutory classification will not be subjected to the searching scrutiny applied in *Skinner* unless the classification is "invidious" or impinges on a fundamental right. *Plyer* v. *Doe*, 457 U.S. 202 (1982). The Court recognized that the classification of different crimes selected by the state in *Skinner* raised "no substantial federal question." 316 U.S. at 540. Rather, it was because the statute derived certain felons, not rationally distinguishable from others, of a "basic liberty" that it was held invalid.

denying them the use of contraceptives. 381 U.S. at 479-80. *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), recognized that the right of privacy guaranteeing the freedom to use contraceptives as a means to control if and when to bear children inheres not only in the marital relationship:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear a child or beget a child. *See Stanley* v. *Georgia*, 394 U.S. 557 (1969). *See also Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29 (1905).

405 U.S. at 453-54 (footnote omitted).

Thus, prior to *Roe* v. *Wade*, the Court had determined that unwarranted intrusions by the state into personal decisions about whom to marry, how to raise and educate children, and when or whether to bear children were proscribed by the guarantee of the Fourteenth Amendment: "nor shall any State deprive any person . . . of liberty . . . without due process of law."

Viewed in this context, it is plain that the Court did not "leap to its conclusion," S.G. at 27, that the right of a woman to choose whether to terminate her pregnancy was encompassed within the right of privacy guaranteed by the Due Process Clause. Rather, the Court carefully considered the rational involved in the cases preceding *Roe* and other factors before it reached its conclusion that the Fourteenth Amendment restricts state action that forbids abortion. *Roe* v. *Wade*, 410 U.S. at 153.

This Court has shown unwavering adherence to its historical reading of the right of privacy in the cases involving abortion since *Roe* v. *Wade*, as well as in matters bearing on conception and family relationships. *E.g.*, *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (invalidating state laws burdening the right to marry); *Carey* v. *Population Services International*, 431 U.S. 678 (1977) (invalidating prohibitions on distribution and advertisement of contraceptives); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (invalidating a zoning law that interfered with decisions as to family composition); *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974) (invalidating an employment rule burdening the woman's decision to bear a child). Because *Roe* v. *Wade* falls squarely within the historical and rational traditions of this Court in elaborating the meaning of the Due Process Clause under which liberty is a "continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints," *Poe* v. *Ullman*, 367 U.S. at 543 (Harlan, J., dissenting), *stare decisis* and the fundamental principles of adjudication of constitutional rights require its reaffirmance in the cases now before this Court.*

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* For the reasons set forth in the opinions of the Third and Seventh Circuits, this Court should affirm the *Thornburgh* and *Diamond* judgments.

Conclusion

For the foregoing reasons, the arguments of the Department of Justice should be rejected, the principles of *Roe* v. *Wade* reaffirmed, and the judgments of the courts below affirmed.

Dated: New York, New York
August 30, 1985

Respectfully submitted,

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Nos. 84-495 and 84-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD THORNBURGH, *et al.*,

Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*,

Appellees.

EUGENE F. DIAMOND, *et al.*,

Appellants,

v.

ALLAN G. CHARLES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS

BRIEF *AMICI CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS, THE COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE, THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, THE NATIONAL LAWYERS GUILD, AND THE NATIONAL TAY-SACHS AND ALLIED DISEASES ASSOCIATION

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INTEREST OF AMICI[1]

THE CENTER FOR CONSTITUTIONAL RIGHTS ("CCR") is a non-profit litigation and educational organization. Founded in 1966 to provide legal support in the Southern civil rights movement, CCR has been a national resource for civil rights and social justice. Securing access to full reproductive rights for all women has been a priority for CCR.

THE COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE ("CARASA") is a New York City-based organization of several hundred women and men dedicated to protecting and furthering women's ability to make choices about their reproductive health and lives, free

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[1]Letters indicating the consent of counsel for all parties to the filing of this brief have been filed with the Clerk of this Court.

from legal, social, and economic constraints. Founded in 1977, in response to the elimination of Medicaid funding for abortion, CARASA has long fought for access to abortion for all women, regardless of income or age, and for an end to coercive sterilization practices. It has also long fought for the availability of social and economic supports--such as child care, adequate wages or public assistance, and affordable housing--so that women who wish to have children can raise them in a safe and healthy environment.

THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE ("NECLC") is a not-for-profit organization dedicated to the defense of the Bill of Rights, particularly for the poor and the powerless. Founded in 1951, the organization has worked to achieve its

goals through litigation and public education. The NECLC is committed to ensuring reproductive freedom for of all women and men.

THE NATIONAL LAWYERS GUILD ("NLG") is an organization of nearly 8,000 lawyers, legal workers, law teachers, and law students. Since its inception in 1937, the NLG has consistently worked on behalf of groups seeking social justice. Many of its members advise and represent women affected by laws which attempt to restrict freedom of choice. The NLG is particularly concerned that allowing the anti-abortion statutes at issue in this case to stand will effectively eliminate options currently available to women and their doctors, forcing women to continue unwanted pregnancies despite the risks they will incur.

THE NATIONAL TAY-SACHS AND ALLIED DISEASES ASSOCIATION is a non-profit organization supporting programs of detection, prevention and research into Tay-Sachs and similar genetic diseases occurring in infants and children. Children afflicted with Tay-Sachs disease, or one of the similar allied diseases, suffer severe mental and physical impairment, resulting in their deaths in infancy or very early childhood. The slow degeneration and eventual death of a child with one of these diseases has devastating and permanent effects on the child's parents and entire family. To help parents through this most difficult time, National Tay-Sachs sponsors a nationwide parent-peer communications network, which allows parents of affected children to obtain the emotional support they can only receive

from other parents of children with the same or similar diseases.

The National Tay-Sachs and Allied Diseases Association, established in 1958, has a membership of approximately 3,000 families. The organization's main purpose is to provide the medical and lay communities with information about the diseases' medical and social implications and the existence of a safe preventative screening measures.

At the close of 1984, approximately 500,000 young adults were screened for Tay-Sachs. Nearly 20,000 carriers have been identified, and over 1,300 pregnancies have been monitored by amniocentesis and chorionic villi sampling (CVS). As of June, 1984, 259 fetuses with Tay-Sachs disease were identified. The other monitored pregnancies resulted in over 1,000 babies being born free of Tay-Sachs disease.

The National Tay-Sachs and Allied Diseases Association firmly supports parents' choice to have children free of debilitating and/or terminal diseases.

SUMMARY OF ARGUMENT

Both Illinois and Pennsylvania attempt to circumvent the clear command of Roe v. Wade and, by prescribing post-viability abortion procedures which diminish women's physical health needs and ignore their mental and emotional health, prohibit such abortions altogether.

Both statutes exalt the state's interest in the potential life of the fetus over the actual lives of women seeking to terminate their pregnancies. Both statutes, in design and effect, impermissibly demean a woman's moral and intellectual decision-making role in the very rare case of post-viability abortion.

The cumulative effect of these statutes is to discourage women from choosing abortion after viability and punish those women who are not deterred. Even for women determined to exercise their constitutional rights, the statutes create a climate of fear and uncertainty within the medical profession which will deter doctors from providing such abortions and achieve the unconstitutional goal not by prohibiting of abortion after viability in haec verba, but by ensuring that the medical community does not make them available to women.

INTRODUCTORY STATEMENT

Reproductive autonomy is at the core of personal freedom. Without it, guarantees of equality are illusory. Women who cannot control when and how many children they will bring into this world cannot participate as free and equal

people in family, social, political, and economic life.

Cognizant of the importance to women of the right to choose abortion, this Court has, for more than a decade, held "that the right of privacy grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy." Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419 (1983), citing Roe v. Wade, 410 U.S. 113 (1973). In so doing, the Court recognized that the right to choose abortion, like the right not to be subjected to involuntary sterilization, Skinner v. Oklahoma, 316 U.S. 535 (1942), is a fundamental aspect of the basic civil right to reproductive autonomy. Since Roe v. Wade, this Court has repeatedly upheld the right to abortion in the face of numerous legislative attempts to

subvert it. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976);Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979). Only two years ago, this Court, in Akron, firmly rejected the suggestion that these cases were wrongly decided and explicitly reaffirmed Roe v. Wade.

Nevertheless, this Court is again being asked both to abandon principles of stare decisis and to deny women the fundamental right of reproductive autonomy that it has enunciated and protected for more than a decade. The Solicitor General argues that this Court should not respect the right to choose abortion because neither the text of the Fourteenth Amendment nor its history explicitly mentions abortion. Brief for the United States as Amicus Curiae in Support of Appellants at 23-30. It is absurd to

contend that, because the drafters of the Fourteenth Amendment were not specifically occupied with the question of abortion, this Court cannot now guarantee the right of procreative choice.

Akron made clear that "the history of this Court's constitutional adjudication leaves no doubt that 'the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the specific guarantees elsewhere provided in the Constitution.'" 462 U.S. at 426-27, quoting Poe v. Ullman, 367 U.S. 497, 543 (1961)(Harlan, J., dissenting). The absence of conclusive evidence of the Amendment's intended effect on access to an important civil right should not determine the outcome here any more than it did in Brown v. Board of Education, 347 U.S. 483 (1954). In this case, as in Brown, "we cannot

turn the clock back to 1868 when the Amendment was adopted." Id. at 492.

It is not surprising that the right to abortion was not addressed in 1868. As the Roe Court was well aware, abortion was a legally permitted option for women well into the 19th century, 410 U.S. at 141, and, as historians tell us, it was an accepted practice well after restrictive legislation was enacted.[2] Focusing instead on the problems brought about by

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[2] See, e.g., The Human Life Bill: Hearings before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, on S. 157, A Bill to Provide that Human Life Shall Be Deemed to Exist from Conception, 97th Congress, 1st Sess. 437-38. (Statement of Dr. Carl Degler, Margaret Byrne Professor of American History, Stanford University). One important reason why anti-abortion measures enacted in the 1860's and 1870's failed to alter official practice was the continuing tolerance of the practice shown by state and local courts in abortion cases. The shift in judicial attitude toward abortion did not begin until the 1880's. J. Mohr, Abortion in America 230 (1978).

the recently concluded Civil War, the framers of the Fourteenth Amendment concentrated on the overriding national issue of guaranteeing rights to the newly emancipated slaves. Thus, for many groups and for women in particular, the war-time Amendments were initially of little assistance in their struggle for basic civil rights. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1873).

Developments in law and society, however, have poured additional meaning into the broad guarantees of the Fourteenth Amendment. Accordingly, in recent years, the Court has repeatedly held that the Fourteenth Amendment guarantees women an opportunity to participate fully in society, no longer relegating them to the domestic sphere of childbearing and

childrearing, see e.g., Reed v. Reed, 404 U.S. 71 (1971) Frontiero v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton, 421 U.S. 7 (1975), just as it now affords both women and men reproductive autonomy.

The recognition of the abortion right evolved out of a steady and growing acceptance of a right of personal privacy extending to family matters including childrearing, procreation, and marriage. See e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Skinner v. Oklahoma, 316 U.S. 535 (1942); Prince v. Massachusetts, 321 U.S. 158 (1944); Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Eisenstadt v. Baird, 405 U.S.438 (1972).[3]

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[3]As this Court recognized in Roe,
(Footnote Continued)

The right to abortion also has close connections with the values embodied in the Thirteenth Amendment, which prohibits all slavery and involuntary servitude, "irrespective of the manner or authority by which it is created." Clyatt v. United States, 197 U.S. 207, 25 S.Ct. 429, 430 (1905). "While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons..." Bailey v. Alabama, 219 U.S. 219, 31 S.Ct. 146, 151 (1911). By forbidding coerced service, it guarantees to all people the right to consent to labor.

(Footnote Continued)
the right to abortion is also closely connected to the common law immunity given to control of one's body. Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891). 410 U.S. at 152. This common law right was given constitutional significance in Terry v. Ohio, 392 U.S. 1 (1968).

Pregnancy and the labor of childbirth are work of the most intimate continuous kind. Pregnancy and childbirth involve vast physical changes in a woman's body and potentially severe pain and discomfort. They involve degrees of risk to life and health from the very serious to the relatively minor. Women undertake voluntary pregnancies cognizant of these risks and burdens. When chosen, when a child is desired, pregnancy may be hard but nonetheless a labor of love. When forced, pregnancy is an intolerable, dehumanizing form of servitude. The right to choose abortion, because it is essential to guarantee women's consent to this labor, is deeply rooted in the core value of the Thirteenth Amendment.

The abortion right, then, is tied both to the Fourteenth Amendment's concept of personal liberty and the Thirteenth Amendment's charter of freedom

from the degradation of forced labor. So rooted, so crucial to women, and so recently reaffirmed, it is a right that must again be respected.

I. BOTH ILLINOIS AND PENNSYLVANIA IMPERMISSIBLY ELEVATE THE STATE INTEREST IN THE POTENTIAL LIFE OF THE FETUS ABOVE WOMEN'S RIGHTS TO LIFE, HEALTH AND PRIVACY IN AN ATTEMPT TO DETER AND PUNISH ABORTIONS LATE IN PREGNANCY

The Illinois and Pennsylvania statutes before the Court on these appeals contain a variety of unconstitutional provisions restricting abortion. Of particular concern to amici are those which sacrifice women's health--physical and emotional--to the purportedly viable fetus.[4] These are the latest in a long

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[4] Amici, although limiting this brief to the viability-related issues, urge affirmance of the judgments of the Courts of Appeals for the Third and Seventh Circuits striking down all Pennsylvania

(Footnote Continued)

line of local laws which attempt to distort this Court's holding in Roe v. Wade that a state's compelling interest in the potential life of the viable fetus can justify laws restricting abortion only if those laws do not jeopardize women's lives or health.

The Pennsylvania Abortion Control Act mandates that doctors terminating pregnancies after viability employ the abortion procedure most likely to result in a live birth unless such procedure "present[s] a significantly greater medical risk" to the woman. Pennsylvania explicitly excludes "the psychological or emotional impact on the mother of the unborn child's survival" from the comparative risk determination. 19 Pa. Cons. Stat. Ann. 3210(b) (Purdon 1983).

(Footnote Continued)
and Illinois provisions burdening the right to choose abortion.

The Illinois statutory scheme permits no consideration of women's life or health in selecting the procedure for post-viability abortions. Ill. Rev. Stat. ch. 38 ¶¶81-26(1),(4) (1983).[5] A physician is excused from a primary duty to preserve fetal life if it "would increase medical risk" to the woman only after the procedure is underway. Id. ¶81-26(5).

These provisions affect very few abortions--less than one percent of all abortions performed.[6] These few late

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[5]Section 6(1) of the Illinois statute appears to unconstitutionally proscribe all post-viability abortions. See Point II,A, infra.

[6]Ninety-nine percent of abortions in 1981 were performed at 20 or fewer weeks gestation (LMP), Grimes, Second Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 264 (1984); Based on 1980 data, it has been suggested that only about 0.01% of all abortions are performed at more than 24 weeks'

(Footnote Continued)

abortions are necessarily late, chosen as they are for reasons which do not arise or are not apparent until later in pregnancy, and the need for them is grave. The statutes at issue here presume that, in this small but significant number of cases, women together with their physicians are incapable of appropriate decision-making.

A. Abortions At or After Viability Are Requested and Performed for Compelling Physical and/or Mental Health Reasons.

A variety of circumstances compel women to choose abortion late in

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(Footnote Continued)
gestation. Henshaw, Binkin, Blaine, Smith, A Portrait of American Women Who Obtain Abortions, 17 Family Planning Perspectives 90, 91 (1985). As shown infra Point II,C, a substantial proportion of this small number of late abortions are performed on women carrying non-viable fetuses. Fetal survival at less than 24 weeks gestation and 600 grams has not been reliably documented. Id.

pregnancy. One circumstance, noted by the Court in Colautti, is the discovery of severe, even fatal, fetal defects. The safest current method of detecting genetic defects is amniocentesis, a test which must be performed well into the second trimester of pregnancy, with results seldom being available before the 19th week of pregnancy.

Were it not for such option of late abortion, many women would choose to abort healthy pregnancies early, for fear that the fetus would be severely defective. Only the possibility of late abortions permits these women to have healthy, wanted children.[7]

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[7]The overwhelming majority of tests for fetal abnormalities are negative, allowing the woman to continue the pregnancy without that anxiety. Simpson and Verp, Prenatal Diagnosis of Genetic Disorders, Principles of Obstetrics, 130-32 (R. Caplan ed. 1982); Caplan,

(Footnote Continued)

The problems of giving birth to a child with a severe genetic defect are many and profound. The mother of a child with Tay-Sachs disease put it succinctly: "Once you've had a child with Tay-Sachs, you can't bring another into the world." "Breakthroughs in Prenatal Testing Give Hope to High-Risk Couples," Wall Street Journal, July 22, 1985, p. 21. For a moving account of the tragedy of Tay-Sachs, see, M. Silver, "Life After Tay Sachs," 99 Jewish Monthly, A Publication of B'nai B'rith, No. 10, pp. 14 et seq. (June-July, 1985).

(Footnote Continued)
Antenatal Care, Principles of Obstetrics, 104 (R. Caplan ed. 1982). This testing process has been estimated to result in abortions in only two to five per cent of the 75,000 or so cases of diagnostic amniocentesis annually. Grimes, Second-Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 261 (1984). This is a tiny percentage of all abortions, but it is a critical one.

One study of parents of children with cystic fibrosis reveals the parents' perceptions.

> ...one mother, who had lost a first-born son, said: 'I often wish he hadn't been born -- for he didn't ask to be born, and if I'd known or thought we would pass on this disease, he'd never have been born.' One mother, who said she had not been told the disease was inherited until she had lost three children, commented: 'If I had known I wouldn't have had any more. It does make me feel guilty having so many. I think it's because they've suffered -- they definitely must suffer having their lungs affected.'

L. Burton, The Family Life of Sick Children 213 (1975).

These problems have a devastating effect on the woman and her family. A woman may not have the psychological or financial resources or the physical energy to cope with a severely damaged child. She may already be caring for other children or a disabled family member. If she gives birth to a child with a birth or congenital defect who requires

constant care, she will be forced to concentrate her energies on the care of the newborn to the detriment of other children or family members, or to give up financially vital employment. Thus, women's health often necessitates an abortion in these tragic circumstances.

Other circumstances requiring late abortions include the sudden or suddenly critical illness of the woman later in pregnancy. Conditions such as pre-eclampsia, diabetes, heart disease, cancer, high blood pressure and kidney disease, either arise or worsen later in pregnancy and necessitate abortions at or after viability--often on an emergency basis.[8] Further, young and poor women,

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[8] See generally, F. Arias, ed., High-Risk Pregnancy and Delivery (1984); See also, Knight and Arias, Third Trimester Bleeding, Id. at 287; Arias, Hypertension During Pregnancy, Id. at 100.

who do not have ready access to health care, delay obtaining abortions necessary to preserve their lives and health because they are unaware of their availability or unable to raise the funds necessary to secure them. The very young and the very poor are the women to whom pregnancy presents the greatest health risk.[9]

When the need for abortion does not arise or become known until late in pregnancy, time is needed to make the decision and, if the decision is to abort, the relative unavailability of

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[9] In 1981, more than one third of all post-first-trimester abortions were obtained by women under the age of 20. Grimes, Second-Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 262 (1984); Alan Guttmacher Institute, Teenage Pregnancy: The Problem That Won't Go Away (1981); Singh, Torres, and Forrest, "The Need For Pre-Natal Care in the U.S.: Evidence From The 1980 Natality Survey," 17 Family Planning Perspectives 118 (1985).

late abortion procedures results in additional delay.[10] In extreme cases, these women may be at the brink of viability when they are finally able to obtain abortions.

If a woman decides to continue a life or health-threatening pregnancy, she cannot be told that the state has concluded that it is not worth the risk. Similarly, a woman who opts for abortion cannot be forced by the state to risk a birth.

B. The Statutory Schemes Compel Disastrous Outcomes.

Both statutes also preclude consideration of the terrible suffering that

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[10] Only a miniscule percent of all abortion providers offer procedures late in pregnancy and it is difficult and time-consuming to locate an appropriate facility. Alan Guttmacher Institute, Public Policy Issue in Brief, February 1983, at 3.

accompanies attempts to produce live births. The statutory language gives the impression that living, healthy infants will be produced. In fact, that result is unlikely. Virtually all of the very few infants born alive from the statutorily mandated procedures would be of extremely low birth weight (1000 grams or less).[11] One recent study showed that fewer than half of all such babies survived to leave the hospital. Most of the deaths occurred within the first month. The lower the birth weight, the worse the chances for survival: more than

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[11] The measurements of development in utero and after birth differ, and are not simple to reconcile. Gestational age is the crucial measure in utero; weight is more widely used after birth. Moreover, "the most important information that an obstetrician requires prior to the interruption of a compromised pregnancy is the status of the fetal lung..." Hobbing, A technical approach to uncertain dates, Perinatal Intensive Care 123, 126 (S. Aladjem and A. Brown eds. 1977).

97% of the infants 501-600 grams died; about 70% of those of 601-700 grams and almost 30% of those of 901-1000 grams died. Saigal, Rosenbaum, Stoskopf, Sinclair, Outcome in infants 501 to 1000 gm birth weight delivered to residents of the McMaster Health Region, 105 J. Pediatrics 969, 974 (1984). Of the infants who had survived through the study period, about half had handicapping conditions the researchers classified as either "major" or "moderate." Id. See also Hirata, Epcar, Walsh, Mednick, Harris, McGinnis, Sehring, Papedo, Survival and outcome of infants 501 to 750 gm: A six-year experience, 102 J. Pediatrics 741 (1983) (60% of such infants in newborn intensive care units died; of the survivors, all were below fiftieth percentile in growth by age 3; one-third were of borderline or lower

intelligence by age 4; 8% died after discharge from hospital).

These outcomes, and the measures required to attain even them, are far from costless for the mother. The anxiety, alienation, disruption to the family and grief of having an infant die or spend months in intensive care (and then probably die) are staggering. See Stinson, The Long Dying of Baby Andrew (1983); Siegel, Gardner, Merenstein, Families in crisis: theoretical and practical considerations in Handbook of Neonatal Intensive Care 421 (G. Merenstein and S. Gardner eds. 1985); Gardner and Merenstein, Grief and Perinatal Loss in id 449. So are the financial costs. Moreover, years of special care are likely to be required if the child survives.

A woman may, of course, freely choose to take these risks.[12] When she has considered and decided not to take them, however, the state is not permitted to override her choice in practice, while appearing to honor it in theory.

The suffering is not obviated by the possibility that a woman may put up her "aborted alive" child for adoption. Many children in that situation will be considered too much at risk to be adoptable. See Stinson, supra. The woman's life will in any event have been drastically changed by the pregnancy and birth. The problems of giving up a child for adoption are particularly acute for

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[12]Women who want to carry to term fetuses with severe defects or life-threatening conditions and rear their disabled children are entitled to the resources and societal support necessary to assure the best possible life prospects.

women because they bear a disproportionate burden of responsibility for children, as well as all the stress of childbirth. Among the psychological burdens of forced childbearing followed by adoption is debilitating anguish over having abdicated responsibility for a child, regardless of the woman's actual ability to fulfill such responsibility had she kept the child. Furthermore, familial and social ostracism may result if the relinquishment is perceived as an abandonment of the child. See, e.g., B. Lifton, Lost and Found: The Adoption Experience 207-27 (1979); Regan, Rewriting Roe v. Wade, 77 Mich L. Rev. 1569, 1589 (1979); Kilibanoff, Genealogical Information in Adoption, 11 Family Law Quarterly 185, 195 (1977).[13]

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[13]In a study of thirty-eight birth parents who have given up children to

(Footnote Continued)

C. The Statutes Disregard Women's Health.

The statutory language attempts to create an illusion of fairness by balancing "the life and health of any unborn child" against "the life or health of the pregnant woman." Roe makes clear, however, that the life and health of a pregnant woman outweigh the state's interest in the potential life of the viable fetus. Moreover, the statute in fact impermissibly weights the balance in favor of the state's protection of fetal

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(Footnote Continued)
adoption between one and thirty-three years before the survey, it was found that "[e]ven if the birth parents had become comfortable with the decision because there were no viable alternatives they nevertheless felt loss, pain, mourning, and a continuing sense of caring for that long vanished child." A. Sorosky, A. Baran, & R. Pannor, The Adoption Triangle 72 (1978). The authors liken relinquishment to a psychological amputation," and present the letters of birth parents expressing their inability to resolve their feelings or forget the children they gave up. Id. at 47-72.

potential. The provision applies only to physical health, without any extraneous female "emotional" factors.[14] Far from being a humane accommodation between competing interests, it reduces a woman to mere physicality. The prohibition on consideration of mental health says that a woman is only a maternal machine that is entitled to be saved from gross

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[14] Indeed, by requiring women to bear "significantly greater medical risk," the Pennsylvania statute even requires women to sacrifice their physical health and possibly their lives in the service of a viable fetus. This demand is clearly foreclosed by this Court's precedents. Roe identified the State's compelling interest in the potential life of the fetus at viability, but made clear that its force stopped at the point of "the life or health of the mother." 410 U.S. at 163-64. The Court of Appeals held that the State can not force doctors to weigh the degree of increased danger to a woman's health against a possible benefit to a viable fetus. A.C.O.G. v. Thornburgh, 737 F.2d at 283, 300 (1984), citing Colautti v. Franklin, 439 U.S. at 400. Any increased danger to the woman overrides the State's interest in fetal potential.

physical damage; she is not a person whose life and future matter.

The artificial definition of "health" is unconstitutionally restrictive. This Court has long recognized that "health" is a complex of factors, "physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient." Doe v. Bolton, 410 U.S. at 192. See also United States v. Vuitch, 402 U.S. 62, 72 (1971). Such an attempt to legislate women's psychological well-being out of existence violates the constitutional mandate of Roe and Doe.

These statutes are unlike the requirement upheld in Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983), that a second doctor attend post-viability abortions. The Missouri provision at issue in Ashcroft protected a baby--a person--

born alive after an abortion procedure. It did not compel an abortion method designed to trigger the need for a second doctor.[15] Here, the states assert their interest in the potential life of a fetus still in utero and seek to compel its actualization with little, if any, regard for the health of the pregnant woman.[16]

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[15]Another provision in the Missouri statute, not before the Court in Ashcroft, did forbid "the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman." 462 U.S. at 483. However, that provision did not, unlike the statutes before the Court on this appeal, constrict the definition of health or prevent a woman, in consultation with her physician, from basing her choice of post-viability procedure on all the aspects of her health recognized in Doe v. Bolton. See Planned Parenthood Asso. of Kansas City v. Ashcroft, 655 F.2d 848, 862-63 (8th Cir. 1981).

[16]In Ashcroft, Justice Powell, reviewing the testimony of a single abortion provider, noted that the record in that case lacked an explanation of "the circumstances when there were

(Footnote Continued)

The solicitude for fetal potential, as expressed in these provisions, exceeds a state's constitutional powers and invades women's constitutional rights. The statutes turn Roe on its head, preferring the potentiality of fetal life to the reality of women's lives, and refusing to recognize women as "persons in the whole sense." 410 U.S. at 162.

D. The Statutes Cruelly Punish Women Who Choose Abortion.

Inherent on the face of the Pennsylvania statute and in the Illinois scheme, is a wholly false distinction

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(Footnote Continued)
'contraindications' against the use of any of the procedures that could preserve viability. . ." 462 U.S. at 483-85, n. 7. The question, however, is not one of provider preference. It is a grave matter of women's total health needs--including mental health, emotional and familial considerations. After all, it is the woman, in consultation with her physician, who makes the choice of procedure, not the physician alone based on his or her convenience or personal views.

between the "psychological and emotional impact . . . of the unborn child's survival" and the mental health reasons for which a woman sought the abortion in the first place. This Court in Roe recognized the importance of the woman's health by limiting the state's power to prohibit post-viability abortions to those cases not jeopardizing women's health. The Pennsylvania statute purports to adhere to Roe by incorporating preservation of the woman's life or health as a reason for abortion in §3210(a). Yet it completely undercuts women's health in §3210(b), which says that, although the health impact of bearing a child can be the basis for an abortion, the state can force a woman to live with exactly the detrimental consequences the abortion was supposed to forestall. This is as cruel as it is absurd.

In addition, the process of forced birth and subsequent surrender have further consequences. A woman, having given birth to a child, must go through the rest of her life with the child's well-being as an unanswered and unanswerable question. Is the child with a loving family? Has the child been left, neglected, in an inferior institution? Has the child received a proper education? In our society, giving birth means having a host of social and emotional connections to the child, even if the birth was unwanted and coerced. These statutes foist those connections, and the difficulty and pain of dealing with them, on women who have considered and rejected them.

Nor would the unconstitutional impact of the statutes be ameliorated in the event that techniques ever improved sufficiently to save almost all extremely

low birth weight infants and afford them a reasonably good prognosis.[17] The state's command to women to produce babies can not be reconciled with the fundamental rights of autonomy and bodily integrity that are part of the constitutional guarantee of privacy. These statutes represent a state choice for reproductive compulsion, a choice can not be made consistent with our Constitution. Cf. A. Huxley, Brave New World (1939).

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[17]The time required for the development of the human lung sets a lower limit on the possibilities of neonatal survival. See experts quoted in Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1024 (1984). See also n. 11, supra.

E. The Statutes Inhibit and Deter Women From Making Reproductive Choices.

These provisions have indirect effects that are as pernicious, and unconstitutional, as their direct effects. By mandating the use of abortion methods that could result in a live birth, the state forces a woman to run the risk of giving birth, very prematurely, to a child who has little chance for a healthy life--when what she has decided on is an abortion, not a birth. Faced with this state-imposed risk, women may very well "choose" to forego the abortion. They will opt to carry their pregnancies as close to term as their health will permit. A woman compelled to have the child she would have chosen not to have may sacrifice her own life and health--and the well being of the rest of her family--to improve the quality of the life of the new child. Women do not want

their children to die, or lead painful and constricted lives. That is often why they choose abortion. If the state forces childbirth upon them when they would have chosen abortion, many women will act to assure the best possible outcome at birth. This Court should not mistake their humane reaction to a state compelled dilemma for a willing surrender of the right to an abortion.

Paradoxically, the statutes also deter women from choosing childbirth in many cases. By forcing women to face the prospect of live births of fetuses diagnosed to be fatally or severely defective, the statutes act to foreclose not only an option for abortion, but an option for birth. See Point I,A, supra. This Court has, since Skinner v. Oklahoma, made clear that the state can not interfere with the reproductive potential of individuals. Women for whom

amniocentesis holds the possibility of childbearing without fear of disaster should not be deprived by the states' rigidity about abortion of their opportunity to bear healthy children.

II. THE STATUTES UNCONSTITUTIONALLY RESTRICT WOMEN'S ACCESS TO ABORTION BY IMPERMISSIBLY RESTRICTING THE ABILITY OF DOCTORS TO EXERCISE THEIR MEDICAL JUDGMENT.

Although appellant-intervenor Diamond[18] characterizes the Illinois regulation of post-viability abortions at issue here as an innocuous effort that "merely regulates the manner in which the physician may perform a post-viable abortion," Brief for Appellants at 37, in reality, the statutes erect a genuine obstacle for women in the form of

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[18] Illinois has not appealed to this Court and Williams, the only other intervenor below, has since died.

criminal sanctions for their doctors. These restrictions have an obvious, direct effect on women, who will not be able to find doctors willing to take the risks imposed on them.

A. Requiring a Physician Performing an Abortion to Treat a Fetus as Though it Were Being Born Alive is Unconstitutional.

Section 6(1)[19] of the Illinois law purports to impose the same standard of

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[19] No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of a fetus known to be viable before or after birth commits a Class 2 felony if the death of a

(Footnote Continued)

care on a physician "who intentionally terminates a pregnancy" post-viability as on a physician attending a live birth. Read literally, this would seem to prohibit the abortion, since the only way to meet this standard of care is to terminate the pregnancy as though a live birth were the desired outcome. This involves a very different course of medical treatment than would be

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(Footnote Continued)
viable fetus or infant results from such a failure.

The Court of Appeals noted that, in June, 1984, §6(1) was "substantially transformed" by amendment. 749 F.2d at 455. Amici therefore suggest that, although the Court of Appeals properly invalidated this provision, the issue is now moot. It is the current statute which governs the availability of abortions in Illinois. No woman could now be affected by the version of §6(1) considered by the Court of Appeals.

In the event that the Court determines that there is still a live controversy as to the decision of the Court of Appeals on §6(1), amici urge affirmance for the reasons here.

undertaken if a live birth were not the outcome sought. For example, in the case of a woman exhibiting placenta previa with moderate bleeding, either an abortion or an attempt to continue the pregnancy could be indicated, depending on the circumstances. If a woman elected to continue the pregnancy, she could be hospitalized for weeks, then undergo a Cesarian section.[20] Knight and Arias, Third Trimester Bleeding, in High-Risk Pregnancy and Delivery 285-87 (F. Arias ed. 1984).

If a woman elects to have an abortion, it should be performed immediately, not after an unnecessary and dangerous delay. Section 6(1) might well

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[20]For an account by parents of the agonizing death of a child born after doctors advised against an abortion in such a situation, see R. Stinson and P. Stinson, The Long Dying of Baby Andrew (1983).

require a woman whose health is threatened by continuation of the pregnancy to go to the brink of death before an abortion could be performed. Under Roe, as reaffirmed by Colautti, the health interest of the woman can not be disregarded until it has reached the point of being acutely life-threatening. The statute, therefore, is plainly invalid at this literal level.

Appellants, however, contend that §6(1) "requires that fetal protection measures be taken during the course of the abortion performed after viability." Brief for Appellants at 31. This reading makes the statute unconstitutionally vague. Since literal compliance is both medically and legally impossible, what is left is a statute requiring physicians to take "fetal protection measures." What are such measures? How heroically must they be pursued? At what

point will such measures impinge on the woman's health, and how will a physician know what to do then? In sum, it is completely unclear what the physician's duty of care could possibly be, or how it could be carried out.

Section 6(1) further imposes liability on doctors for conduct with respect to a fetus "known to be viable." The statute does not specify how or under what standards the knowledge is to be evaluated, or by whom. These are crucial omissions, rendering the statute unconstitutionally vague.

There is no consensus in the medical community about how great the chance for survival must be in order for a fetus to be considered viable.[21] There is also

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[21] Colautti at 388-89 quotes two physicians who gave different percentage figures and one who refused to use a

(Footnote Continued)

disagreement as to what variables should be accorded greatest weight.[22] As this Court has recognized,

> [t]he prospect of such disagreement, in conjunction with a statute imposing strict . . . criminal liability for an erroneous determination of viability could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.

Colautti, 439 U.S. at 397.

Because the ascertainment of viability is dependent on many variables, viability determinations also may be

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(Footnote Continued)
fixed percentage. See also Roe, 410 U.S. at 159.

[22] Compare Williams Obstetrics 173 (J. Pritchard & E. MacDonald 16th ed. 1980), (favoring fetal age as the most reliable determinant of chance for survival ex utero) with Williams, et. al., Fetal Growth and Perinatal Viability in California, 59 Ob. Gyn. 624 (May 1982) (finding that birth weight plays a greater role than gestational age in predicting survivability).

inaccurate by as much as several weeks.[23] Even the most advanced instruments for assessing fetal age have a five-day margin of error, and this margin is greater if the woman does not undergo ultrasound between the eighth and twelfth weeks of pregnancy.[24] It is simply not possible to "know" objectively that a fetus is viable. The imposition of

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[23]Grimes, supra n. 9, at 260-61.

[24]Hohler, Multiple Ultrasound Measures of Fetus More Accurate, 18 Ob. Gyn. News 50 (May 15-31, 1983). Contrary to the assumption of the Illinois statute that viability is an empirically objective fact, the viability assessments of physicians are highly subjective ones, based largely on experience: "The choice of 26, 27, 28 or any other number of weeks as the point of medical viability by experts in the field is based on experience from observing thousands of premature births and the correlation of survivals with estimated fetal age." Lenow, The Fetus as Patient: Emerging Rights as a Person, 9 Amer. J. Law & Medicine 1 (1983); see also, Bolognese and Roberts, Amniotic Fluid, in Perinatal Medicine: Management of the High Risk Fetus and Neonate 198-203 (2d ed. 1982).

criminal penalties on physicians on the basis of a presumed knowledge that is not possible to obtain and inadequate standards is clearly unconstitutional.

The central problem of lack of accepted objective standards is exacerbated by the statute's failure to specify who makes the determination that the fetus at issue is viable. This opens the physician to possible second-guessing by state law enforcement personnel or other medical personnel. That prospect is what has led this Court to hold repeatedly that "[t]he determination of whether a particular fetus is viable is, and must be, a matter for the responsible attending physician." Planned Parenthood v. Danforth, 428 U.S. at 64, cited in Charles v. Daley, 749 F.2d at 459. See also Colautti v. Franklin, 439 U.S. at 396-97. The statute unconstitutionally leaves the physician in doubt on this

crucial point.

B. Pennsylvania's Attempt to Create a Balance Between Fetal Viability and Risk to Women is Unconstitutionally Vague.

Section 3210(b) of the Pennsylvania statute requires physicians to choose a post-viability abortion method "which would provide the best opportunity for the unborn child to be aborted alive" unless the use of that method would pose a "significantly greater" risk to the woman. This section is impermissibly vague because it forces physicians to combine their estimate of viability and their estimate of "significantly greater" risk to women, then attempt to balance them, and threatens criminal penalties if they strike a balance that the State does not like. As noted in Section II.A, supra, viability is itself an estimate. Colautti, 439 U.S. at 395-96. Viability estimates vary widely from case to case

and from physician to physician. Colautti, 439 U.S. at 396, and n. 14.

Compounding the uncertainty inherent in the viability determination is the requirement that physicians assess the significance of the increased risk to the woman. In what respect must a risk be "significantly greater?" Physicians are then required to compare their estimates of the magnitude of benefit to the fetus with their estimates of the magnitude of harm to the woman. This Court's conclusion about an earlier attempt by Pennslyvania in this area is equally applicable to §3210(b): "The State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." Colautti, 439 U.S. at 401.

C. Reporting Requirements That Focus on a Physician's Determination of Viability Endanger Women and Unconstitutionally Chill Physicians

Section 3211 of the Pennsylvania statute requires a physician to

> determine whether, in his good faith judgment, the child is viable. When a physician has determined that a child is viable, he shall report the basis for his determination that the abortion is necessary to preserve maternal life or health. When a physician has determined that a child is not viable, he shall report the basis for such determination.

The Court of Appeals held that this requirement was unduly burdensome and furthered no compelling interest at the pre-viability stages. 737 F.2d at 301. Moreover, the requirement of reporting the basis for determining that "a child is not viable" creates an unnecessary and unconstitutional pressure on doctors.

The very language of the provision tells physicians that the state sees the fetus as a person ("a child"), contrary

to medical reality and the mandate of Roe. This attitude can only lead physicians to err on the side of the fetus in exercising their professional judgment, to the detriment of the woman and her rights.

The reporting requirements further impermissibly introduce the possibility of conflict between physicians' reporting duties and their medical judgment and responsibility to their patients. Deciding whether a fetus is viable in a marginal case is not, however, a simple or rapid process.[25] In some circumstances of urgent medical necessity, termination of pregnancy must be undertaken almost as soon as the

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[25] Experts recommend both ultrasound and amniocentesis. Knight and Arias Third Trimester Bleeding, in High-Risk Pregnancy and Delivery 287 (F. Arias ed. 1984).

precipitating medical condition has been discovered.[26]

The reporting requirement compounds the disruption of the physician's judgment and practice begun by the viability focus of §3210(b). Should the physician take the time to make a full-scale viability determination that will satisfy the unknown persons who will later read the report at leisure? Even wondering about what to do can take valuable time in an emergency. The lack of direction to the physician about how to comply with this section, as well as the absence of an emergency exception to the requirements, render these provisions invalid.

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[26] E.g., placenta previa with severe hemorrhage, severe preeclampsia, carcinoma of the cervix. See n. 8, supra.

Under both the Illinois and the Pennsylvania statutory schemes, the fear of incurring criminal liability will induce doctors to err on the side of finding viability whenever the slightest chance of inaccuracy exists and to refuse to perform needed abortions. Because of the uncertainties inherent in determining viability, a large percentage of cases in which doctors are deterred from performing abortions will be of women carrying non-viable fetuses. The implementation of these statutes will undoubtedly result in the unconstitutional denial of abortions to women greatly in need of them.

D. The Statutes Straitjacket Doctors by Compelling Them to Convey Medically Inaccurate Information to Women Seeking Abortions.

Both the Illinois and Pennsylvania statutes require doctors to respond in a rigid, mechanical, and predetermined way when they attend patients seeking

abortions at or near viability. The statutes greatly circumscribe the exercise of physicians' medical judgment and distort the process of abortion care. By forcing doctors to inform their patients of an obligation to try to salvage the fetus, the statutes force them to perpetrate a cruel deception on pregnant women.

This is most pointedly the case with respect to Illinois §6(4), which has introduced an idea that can only be expressed as that of a "possibly viable" fetus.[27] This is simultaneously

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[27] No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of

(Footnote Continued)

redundant and confusing. Viability incorporates, by definition, a calculation of possibility.[28] A statutory scheme based on a possible possibility can not help physicians give women sound advice, especially since a pre-viable fetus will, by definition, die before or shortly after birth. Nor can it be a basis for criminal liability.[29]

(Footnote Continued)

> the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of more than momentary survival of the fetus, apart from the body of the mother, with or without artificial support.

(emphasis added).

[28] Williams Obstetrics 587 (J. Pritchard & E. MacDonald, 16th ed. 1980) defines viability as a concept "widely used to identify a reasonable potential for subsequent survival if the fetus were to be removed from the uterus." (emphasis added).

[29] Illinois's perception of viability in §6(4) is so loose that it might even

(Footnote Continued)

In addition, Illinois §6(1) and Pennsylvania §3210(b), by creating criminal liability based on the physician's viability determination, distort the process of medical judgment. Even without the influence of the statutes, fetuses are wrongly deemed to be viable and die shortly after birth. The statutes, however, require physicians to act as though there are no marginal cases and

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(Footnote Continued)
justify an argument that the conceptus at any point is a "possibly viable" fetus, since in some sense it can survive for more than a moment outside the body of the woman, albeit with artificial support. Moreover, the phenomena of cloning, parthenogenesis and chimerism, demonstrate that the human zygote is not unique in its capacity to develop into an organisism. "If it is argued that a zygote should have the rights of personhood because it has the capacity to develop into a person, then one can also argue that an unfertilized egg should have the rights of personhood since it also may have the same capacity. Milby, The New Biology and the Question of Personhood: Implications for Abortion, 9 Amer. J.L. & Medicine 31, 32 (1983).

no countervailing factors: every fetus deemed viable must be treated in the same way, and every woman carrying such a fetus must be treated in the same way. This mandate denies to physicians the discretion and flexibility they need in order to make their best medical judgments in a difficult and sensitive area.

The statutes therefore require doctors to mislead their patients into believing that a reasonable possibility exists of giving birth to a baby able to sustain life, when, in fact, almost no possibility exists. In this way, not only do the statutes invade the privacy of the doctor-patient relationship, but they also actively encourage doctors to medically mislead pregnant women. This deception and the unnecessary grief it

will precipitate[30] cannot be overlooked in an evaluation of the statutes' unconstitutionality.

III. SECTION 6(4) OF THE ILLINOIS STATUTE IMPERMISSIBLY REGULATES ABORTIONS PRIOR TO VIABILITY IN CONTRAVENTION OF ROE v. WADE.

The Court in Roe declared, and in Colautti confirmed, the invulnerability of pre-viability abortions to state interference for any reason not related to maternal health. Roe, 410 U.S. at 154, 159, 169; Colautti, 439 U.S. at 682. Illinois, however, has tried to impose a requirement that doctors use the same standard of care in aborting a fetus which has a "possibility" of "more than momentary" survival[31] as in bringing to

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[30] See Point 1,B, supra.

[31] The statute has since been amended. The Court of Appeals did not

(Footnote Continued)

birth a truly viable fetus. This is plainly an impermissible regulation of pre-viability abortions. By its own terms, §6(4) identifies a period in pregnancy prior to viability. Because there is a parallel requirement in §6(1) which is addressed to fetuses deemed "viable," the legislature clearly intended the two sections to refer to different points in pregnancy. See Colautti v. Franklin, 439 U.S. at 393; Charles v. Daley, 749 F.2d at 460.

This intrusion into the period prior to viability is not justifiable. This Court has held that statutes purporting

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(Footnote Continued)
pass on the validity of the amended version. 749 F.2d at 452. Amici suggest that, although the Court of Appeals properly invalidated this provision, the issue is now moot. See n. 19, supra. In the event that the Court determines that there is still a live controversy as to the decision of the Court of Appeals about §6(4), amici urge affirmance for the reasons stated here.

to regulate abortions prior to viability, except on grounds of maternal health, unconstitutionally infringe upon a woman's fundamental right of privacy under the Fourteenth Amendment. Colautti v. Franklin, 439 U.S. 379, 388 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 63-64 (1976). Appellants concede, as they must, that Illinois' alleged interest in the fetus prior to viability is not compelling. Brief of Appellants at 38, 43. They offer no maternal health justification for the statute. The Court of Appeals correctly noted that §6(4) "does not seek to protect the health of the mother." 749 F.2d at 461. Therefore, it can not stand.

Although appellants attempt to salvage their position by suggesting that the pre-viability stages are subject to a "balancing" of interests (Jurisdictional Statement at 55), it is clear that the privacy right recognized in Roe would be meaningless if the right could be so abridged prior to viability. The "balance" appellants call for has already been struck. Roe v. Wade, 410 U.S. at 164-65.

CONCLUSION

The states' assertion of fetal primacy and their willingness to impose substantial and long-term hardships on women to implement that view goes well beyond constitutional bounds.

The judgments of the Court of Appeals for the Third Circuit and the Court of Appeals for the Seventh Circuit should be affirmed.

Dated: New York, N.Y.
August 30, 1985

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* Counsel gratefully acknowledge the assistance of legal workers Joan L. Washington and Dorothy Zellner, and Sara Mandelbaum and Elizabeth Szabo, law students at the Rutgers School of Law, in the preparation of this brief.

(24) (15)

Nos. 84-495 and 84-1379

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v.
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GYNECOLOGISTS, ET AL.

EUGENE F. DIAMOND, ET AL., APPELLANTS
v.
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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE -- WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES, CALIFORNIA; CALIFORNIA WOMEN LAWYERS; THE WOMEN'S BAR ASSOCIATION OF ILLINOIS; THE FLORIDA ASSOCIATION OF WOMEN LAWYERS; FLORIDA ASSOCIATION OF WOMEN LAWYERS, DADE COUNTY CHAPTER; AND CALIFORNIA LAWYERS FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENTS AND AMICUS BRIEF

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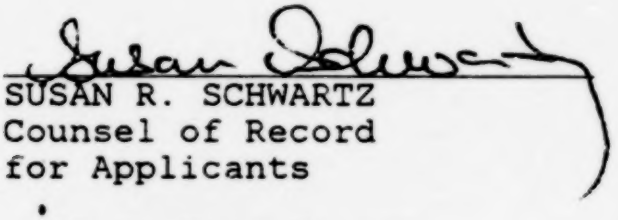
Women Lawyers' Association of Los Angeles, California; California Women Lawyers; the Women's Bar Association of Illinois; the Florida Association of Women Lawyers; The Florida Association of Women Lawyers, Dade County Chapter; and California Lawyers for Individual Freedom respectfully move this Court for leave to file the accompanying brief in this case as amicus curiae. The consent of the attorneys for respondents and one of the appellants herein has been obtained, but the attorneys for the remaining appellant herein refused to consent to the filing of this brief.

Applicants have an interest in this case because they are organizations that have professional women

as members, that have women as clients, and that are concerned with protecting the constitutional rights of women in society. Applicants and their members are personally and professionally concerned with the importance of preserving a woman's right to decide whether to terminate a pregnancy because pregnancy may adversely affect a woman's health, her life plans, the welfare of her family, and the welfare of unwanted children.

The attached brief responds to the arguments made by the Solicitor General of the United States in his amicus brief filed in support of respondents. Applicants believe

that the Solicitor General's arguments will not be adequately addressed by the respondents. If applicants' argument is approved by this Court, the decisions of the Appellate Courts below must be affirmed.



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Nos. 84-495 and 84-1379

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

RICHARD THORNBURGH, ET AL., APPELLANTS
v.
AMERICAN COLLEGE OF OBSTETRICIANS AND
GYNECOLOGISTS, ET AL.

EUGENE F. DIAMOND, ET AL., APPELLANTS
v.
ALLAN G. CHARLES, ET AL.

ON APPEAL FROM
THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND SEVENTH CIRCUITS

BRIEF OF AMICUS CURIAE WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES, CALIFORNIA; CALIFORNIA WOMEN LAWYERS; THE WOMEN'S BAR ASSOCIATION OF ILLINOIS; THE FLORIDA ASSOCIATION OF WOMEN LAWYERS; FLORIDA ASSOCIATION OF WOMEN LAWYERS, DADE COUNTY CHAPTER; AND CALIFORNIA LAWYERS FOR INDIVIDUAL FREEDOM IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amici curiae are state or local bar organizations having as members female and male lawyers and judges who are concerned with the special problems faced by women. California Lawyers for Individual Freedom is an organization of attorneys in the San Francisco area concerned with the preservation of personal liberties under the Constitution.

Amici and their members are personally and professionally concerned with the importance of preserving a woman's right to decide

whether to terminate a pregnancy because, as this Court found in Roe v. Wade, 410 U.S. 113, 153 (1973), pregnancy may adversely affect a woman's health, her life plans, the welfare of her family, and the welfare of an unwanted child. Amici therefore submit this brief in response to the amicus curiae brief submitted by the Solicitor General of the United States.

SUMMARY OF ARGUMENT

The Solicitor General's argument that there is no fundamental constitutional right to choose whether to terminate a pregnancy is

untenable and unfounded. The doctrine of stare decisis requires reaffirmance of the holding in Roe v. Wade, which recognized that right. The right to choose to terminate a pregnancy is a fundamental right concerning a private decision about family matters that is clearly protected by the Due Process Clause of the Fourteenth Amendment. It is a well-established principle of constitutional law that any state regulation of such a fundamental right is subject to strict scrutiny and must be justified by a compelling state interest where the regulation impinges on the individual's right. In applying this test, the

state interest must be defined in a way that does not violate the Establishment Clause of the First Amendment. Finally, public policy and opinion support the Court's continued recognition of the constitutional right to reproductive choice.

ARGUMENT

I. INTRODUCTION.

In an amicus curiae brief in this action, the Solicitor General has urged this Court to overturn its decision in Roe v. Wade, 410 U.S. 113 (1973), holding that a woman has a fundamental right to decide whether to terminate a pregnancy, and, by

implication, the score of its decisions which have accepted and applied Roe v. Wade.

Only two years ago the Court reviewed and explicitly reaffirmed Roe v. Wade in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). In fact, in Akron the Court not only approved Roe v. Wade, but also clearly reaffirmed that a woman's right to choose whether to terminate a pregnancy is a fundamental constitutional right and, therefore, any state regulation of it is subject to strict scrutiny.

The Solicitor General would take away a woman's right to

choose whether to terminate her pregnancy and instead interject governmental control into our most personal and private decisions. Adoption of the Solicitor General's position would result in a return to the days of unsafe, illegal abortions for women unable to endure a harmful or unwanted pregnancy.

Amici curiae believe that every person has a constitutional right to be free from the intrusion of the government into his or her most intimate personal decisions, and that this right clearly encompasses a woman's right to choose what will happen to her own body and, indeed, her own life. In this

brief, amici curiae will demonstrate that the decisions in Roe v. Wade and Akron should be reaffirmed not only on the basis of stare decisis, but also on the ground that they were correctly decided in the first instance. Amici urge the Court to once again reaffirm what has become a long line of decisions recognizing and protecting a woman's right to reproductive choice.

II. STARE DECISIS REQUIRES THAT ROE V. WADE BE REAFFIRMED.

The Solicitor General urges the Court to ignore the doctrine of stare decisis as applied to a woman's well-recognized constitu-

tional right to decide whether to terminate her pregnancy. This position underrates the strength and significance of the doctrine of stare decisis, particularly as applied to this Court's decision in Roe v. Wade.

A. Reaffirmance of Roe v. Wade Will Promote Stability, Judicial Efficiency and Public Faith in the Judicial System.

This Court has explained the purpose and importance of the doctrine of stare decisis by saying:

> "Very weighty considerations underlie the principle that Courts should not lightly overrule past decision: .

> Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970).

No. 84-495

IN THE

Supreme Court of the United States

October Term, 1984

RICHARD THORNBURGH, H. ARNOLD MULLER, HELEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM J. DAVIS, LeROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants,

vs.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR *AMICUS CURIAE* NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, INC.

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Statement of Interest of *Amicus Curiae*

The National Family Planning and Reproductive Health Association, Inc. is a broad-based coalition of family planning providers and consumers working together to enhance the delivery of family planning services throughout the United States. Committed to the concept of reproductive freedom for all Americans, NFPHRA seeks to ensure that adults and adolescents alike obtain relevant information and medically necessary clinical services pertaining to family planning and reproductive health care, *inter alia*, abortion. Validation of the Pennsylvania Abortion Control Act would significantly limit reproductive freedoms and the availability of proper clinical services.

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-495

RICHARD THORNBURGH, H. ARNOLD MULLER, HELEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM J. DAVIS, LeROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants,

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR *AMICUS CURIAE* NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION, INC.

Summary of the Argument

The Court of Appeals for the Third Circuit properly struck down those provisions of the Pennsylvania Abortion Control Act addressed to informed consent and post-viability abortions. In addition, the Court of Appeals properly enjoined the operation of the parental consent provisions.

Section 3205(a) impermissibly intrudes into the physician-patient relationship, by mandating that a *physician* supply each woman desirous of an abortion specified information. As the "physician-only" requirement is not severable, Section 3205(a)(1) is unconstitutional in its entirety. Section 3205(a)(2) is also unconstitutional, in that it requires that each woman be provided with an opportunity to review additional information immaterial to rational decision-making, regardless of the woman's prior knowledge or awareness, or whether her review of such information is deemed medically inadvisable. Finally, the informed consent provision reflects the efforts of the General Assembly to skew a woman's choice in favor of childbirth, and thus, does not withstand constitutional scrutiny.

Section 3206, the parental consent or consent substitute provision, unconstitutionally fails to afford sufficient protection to the right of an unemancipated minor to procure an abortion. By mandating that a parent be provided with inflammatory materials and biased information devoid of medical relevance, Section 3206 attempts to persuade parents to irrationally withhold consent to an abortion. The procedural mechanism available to a minor for obtaining judicial consent in lieu of parental consent is also constitutionally defective, in that it fails to maintain essential confidentiality, and permits an individual untrained in reproductive health to override the physician's professional judgment, on the basis of an overbroad standard of "usefulness."

The Pennsylvania standard-of-care provision for post-viability abortions, requiring as it does use of the method most likely to result in fetal survival, unless that method would significantly increase the risk to maternal life or health, unconstitutionally elevates fetal life over maternal health and may require a woman to endure increased personal risk for the sake of the fetus. Similarly, the requirement that, *in all cases*, the attending physician secure the attendance of a second physician with responsibility solely to the fetus, at the risk of criminal sanction, is constitutionally deficient, given its failure to allow for emergency situations.

Introduction

In 1973, this Court definitively announced that the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy. *Roe v. Wade*, 410 U.S. 113, *Reh. Den.* 410 U.S. 959 (1973). As with other fundamental rights, however, the right of a woman to elect to undergo an abortion is not unqualified. Rather, in recognition of a State's legitimate interest in the health of a woman, and in the potential life represented by the fetus, this Court has permitted states to impose carefully tailored restrictions, designed solely to advance those particular state interests, on the procurement of an abortion. *See, e.g., Simopoulos v. Virginia*, 462 U.S. 506 (1983) (Requirement that all second-trimester abortions be performed in hospital or out-patient clinic upheld); *Planned Parenthood Association of Kansas City, MO v. Ashcroft*, 462 U.S. 476 (1983). (Requirement that a pathology report be prepared for each abortion performed upheld.)

In promulgating the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Sections 3201 *et seq.* (hereafter, the Act), the Pennsylvania Legislature greatly exceeded the permissible constitutional parameters of abortion legislation, and legitimate state interest established by the decisions of this Court. Thus, *amicus curiae* maintains, the Court of Appeals for the Third Circuit properly invalidated those provisions of the Act imposing an "informed consent" requirement, 18 Pa. Cons. Stat. Sections 3205 and 3208, those provisions regulating the performance of abortions after viability, 18 Pa. Cons. Stat. Sections 3210(b) and (c), and those mandating the compilation and filing of detailed reports, 18 Pa. Cons. Stat. Sections 3211(a) and 3214. In addition, *amicus curiae* contends, the Court of Appeals properly enjoined the enforcement of the parental consent provision, 18 Pa. Cons. Stat. Section 3206.

ARGUMENT

I. The Court of Appeals for the Third Circuit properly invalidated the Act's informed consent provisions, given that they impermissibly require that (1) a *physician* relate certain information to each woman considering abortion, and (2) that information outside the scope of medical expertise and designed to promote, in a non-neutral fashion, the Commonwealth's policy preference for childbirth over abortion be presented; these requirements unduly interfere with the physician-patient relationship and impermissibly influence a woman's choice between abortion and childbirth.

In 1976 this Court acknowledged the validity of a Missouri statute requiring that an attending physician obtain the informed consent of a woman, in writing, prior to performing an abortion. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). As this Court reasoned,

> The decision to abort . . . is an important and often a stressful one, and it is desirable that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the state to the extent of requiring her prior written consent. *Id.*, at 67.

Although the statute at issue in *Danforth* did not specifically define "informed consent", this Court did define it, as information indicating "just what would be done and . . . [the] consequences." *Id.* at 67, N. 8. As the *Danforth* Court explained, "to ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable strait-jacket in the practice of his profession." *Id.* Thus, states legitimately may seek to insure that the decision to abort has been made "in the light of all attendant circumstances—pyschological and emotional as well as

physical—that might be relevant to the well being of the patient." *Colautti v. Franklin*, 439 U.S. 379, 394 (1979). States may also express a policy preference for childbirth. Statutes and Regulations, however, which unreasonably place "obstacles in the path of the doctor upon whom the woman is entitled to rely for advice in connection with her decision," *Whalen v. Roe*, 429 U.S. 589, 604 N. 33 (1977), or which are designed to influence a woman's informed choice between abortion or child-birth, are constitutionally impermissible. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 443-444 (1983).

Pennsylvania's Abortion Control Act conditions a physician's performance or inducement of an abortion on a woman's written voluntary and informed consent. 18 Pa. Cons. Stat. Section 3205. A woman's consent will not, however, be deemed voluntary and informed unless she is provided with information addressed to eight specific areas. The Act's informed consent provisions do much more than require that a woman be told what is to be done and the consequences as mandated by *Danforth*. Rather, by requiring that a *physician* relate certain information to each woman considering abortion, and by mandating that other information outside the scope of medical expertise and clearly designed to promote, in a non-neutral fashion, the Commonwealth's policy preference for child-birth over abortion, be presented, the Act attempts to extend Pennsylvania's interest in ensuring informed medical consent beyond the constitutional limits of consent and into the area of influence.

Section 3205(a)(1) requires that a woman be made aware of (1) the name of the physician who will perform the abortion; (2) the possibility of detrimental physical and psychological effects, not accurately foreseeable at present; (3) the medical risks associated with the particular abortion procedure chosen for her, including,

when medically accurate, the risks of infection, hemorrhage, danger to subsequent pregnancies and infertility; (4) the probable gestational age of the "unborn child" at the time for which the abortion is scheduled, and (5) the medical risks associated with carrying the "child" to term. In addition, the class of individuals legislatively approved as the source of the information referred to above is restricted; Section 3205(a)(1) explicitly states that, "the physician who is to perform the abortion or [the referring physician], but not the agent or representative of either," convey this information.[1]

This Court recently invalidated a similar "physician only" requirement. *City of Akron, supra.* Conceding the invalidity of such a requirement, appellants focus on the Act's severability clause.[2] Thus, appellants conclude, the "physician only" requirement, though objectionable, is severable and may be removed. Appellants argue that if modified to remove the physician only requirement, Section 3205(a)(1) is constitutional. *Amicus curiae* strongly disagrees.

The legislative scheme governing informed consent to an abortion in Pennsylvania clearly reflects the intent of the General Assembly that the operating or referring physician be the individual from whom a woman considering pregnancy termination receives the requisite information. Section 3205(a)(1) unequivocally seeks to guarantee that a woman receives this information from the physician who is to perform the abortion or the referring physician, *and no one else*; failure to provide the information subjects a physician to suspension or

[1] Section 3205 also mandates that a woman be provided with this information "at least 24 hours before the abortion." Appellants concede the invalidity of such a requirement; this provision is not at issue in the instant appeal.

[2] Section 5 of Act 1982, June 11, P.L. 476, No. 138, provides that the provisions of the Pennsylvania Abortion Control Act "shall be severable."

revocation of his license. Section 3205(c). As this Court has observed, the starting point in interpreting a statute is the language of the statute itself; absent a clearly expressed legislative intent to the contrary, statutory language must ordinarily be regarded as conclusive. *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155 (1981); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). Here, the legislative will that a treating or referring physician "inform" a woman contemplating abortion of the name of the attending physician, the attendant risks, and the status of the fetus, finds clear expression in Section 3205(a)(1). Thus, the Court of Appeals for the Third Circuit properly concluded that excision of the admittedly unconstitutional language from Section 3205(a)(1) would not advance the goal of the Pennsylvania General Assembly but, rather, would impede it.

This conclusion is strengthened, *amicus curiae* contends, by consideration of Section 3205 in its entirety. *See United States v. Morton*, _____ U.S. _____, 104 S. Ct. 2769, *Reh. Den.* _____ U.S. _____, 105 S. Ct. 27 (1984); *Kokoszka v. Belford*, 417 U.S. 642, *Reh. Den.* 419 U.S. 886 (1974). (Statutory phrases are not to be construed in isolation, but are to be viewed in light of the entire statute.) The two principal components of the Pennsylvania informed consent requirement, Sections 3205(a)(1) and (2), received dissimilar treatment at the hands of the Legislature. While Section 3205(a)(1) requires the information detailed therein to be disseminated by the attending or referring physician, Section 3205(a)(2) expressly permits the physician or an agent of the physician to apprise the woman of other information deemed legislatively relevant to her decision. Although appellants contend that this differentiation suggests that the Pennsylvania Legislature did not view the identity of the source of information as critical, the statutory language itself undermines appellants' position. Where the Legislature selects and includes

particular language in one part of the statute but omits it in another section of the same act, it is generally presumed that the Legislature acted intentionally and purposely in the disparate inclusion or exclusion. *Russello v. United States*, _____ U.S. _____, 104 S.Ct. 296 (1983). Simply stated, the Legislature's use of different language in statutory provisions addressed to the same subject-matter does not reasonably warrant the conclusion that the Legislature was unconcerned with whether different conduct was thereby prescribed. By placing "physician-only" language in Section 3205(a)(1) and "physician or agent" language in 3205(a)(2) it must be concluded that the Legislature intended that physicians and physicians only must provide the information required by 3205(a)(1). *Cf., City of Akron, supra.* (Pervasive "physician only" requirement of abortion statute's informed consent provision is indicative of legislature's concern that similar treatment be given to all classes of information.)

Appellants persist, however, contending that the Pennsylvania Legislature would have preferred a requirement that the information referenced in Section 3205(a)(1) be provided by a physician *or his agent*, to the absence of any requirement that the information be conveyed at all—the result of a finding of nonseverability. *Amicus curiae* strongly urges this Court, however, to decline appellants' invitation to engage in such speculation. The Pennsylvania General Assembly made the impermissible "physician only" requirement an integral part of Section 3205(a)(1). Thus, the Court of Appeals properly rejected appellants' claim of severability.

Similarly, Section 3205(a)(2) of the Act impermissibly infringes upon the role of a physician or counselor, thinly concealing an attempt to advance the Commonwealth's preference for childbirth by persuading pregnant women

to pursue this alternative.[3] Section 3205(a)(2) requires a physician or his agent to advise each woman desirous of terminating her pregnancy of the potential availability of medical assistance benefits for prenatal care, childbirth, and neonatal care, and of the father's liability to support the child. 18 Pa. Cons. Stat. Sections 3205(a)(2)(i) and (ii). Clearly, a requirement that such information be provided goes far beyond the informed consent provision approved in *Danforth, supra,* as well as the concept of informed consent as defined by the Pennsylvania Legislature within the context of medical practice and procedures. As the Pennsylvania Health Care Services Malpractice Act indicates, a patient's consent will be considered informed when she has been made aware of "the nature of the proposed procedure or treatment and of the risks and alternatives to treatment or diagnosis that a reasonable patient would consider material to the decision whether or not to undergo treatment or diagnosis." 40 P.S. Section 1301.101. The obligation to discuss *medical* risks and alternatives with a patient is qualified, however; a physician is relieved of professional liability for failing to furnish such information if it would have had a serious adverse effect on the patient or on the therapeutic process to the material detriment of the patient's health. *Id.*

Courts in several jurisdictions have concluded that "informed consent" as defined for medical practice and procedure purposes should also be the standard used in the abortion context. As the Court observed in *Women's Medical Center of Providence, Inc. v. Roberts,* 530 F.Supp. 1136 (D.R.I., 1982), there is no *medical* justification for differentiating between abortions and other surgical procedures; requiring disclosure of even all medical risks would constitute a substantial interference in the doctor-patient relationship. *Id.*, at 1152.

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[3] An appellate court can affirm on any basis, regardless of whether that reason was advanced by the court whose decision is reviewed. *Dandridge v. Williams,* 397 U.S. 471, 475 n. 6 (1970).

If a requirement that, notwithstanding the medical advisability, a woman be apprised of all medical risks attendant to a procedure, cannot be justified, nor can a requirement that non-medically related information be conveyed in the context of abortion solely as a medical procedure. Indeed, in *Freiman v. Ashcroft*, 584 F.2d 247 (8th Cir. 1978), aff'd 400 U.S. 941 (1979), the Court of Appeals for the Eighth Circuit rejected a requirement that a physician advise a woman that she would have no legal rights in a child born during an attempted non-therapeutic abortion. As the appellate court remarked,

> "[T]he Supreme Court did not hold that a state may require a physician to provide to each patient any and all information required by the state, regardless of its legality, constitutionality or medical advisability. . . . [A]lthough requiring the physician to tell his patient what will be done to accomplish the abortion and what the consequences will be assists the patient in being able to give an informed consent, the requirement that the physician tell his patient [that she will have no rights in a child resulting from the attempted abortion] is not reasonably related to the purpose of informed consent. . . *The result of a physician's warning would be to inject into the decision-making process between physician and patient a factor which is irrelevant and extraneous to the medical services being rendered.*" (Emphasis added)

584 F.2d at 251.[4]

Also addressing the disparity in standards of informed consent for abortion and all other medical procedures, the Court of Appeals for the First Circuit noted that a description of "the availability of alternatives to abortion" had no direct bearing on any medically relevant factor, and thus, did not fit within the

[4] Although the statute reviewed in *Freiman, supra*, required the attending physician to inform the woman of the legal implications of her decision, the instant statute permits the delegation of this responsibility. This distinction is not, however, dispositive, given the analysis here presented.

traditional ambit of informed consent, confined to the disclosure of matters within the physician's special knowledge or expertise. *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981). As the Court then remarked,

> [T]hat traditional understanding has been derived from the role played by informed consent as a malpractice litigation doctrine, a context in which doctors are individually held responsible for the dispensation of certain information and in which it makes eminent sense to limit their obligation to matters within their special competence. Here, by contrast, no concern for physician liability is present; the sole question is whether the information would serve to make a woman better informed or not.

Id., at 1020.

Unlike the Massachusetts provision scrutinized in *Planned Parenthood League of Mass. v. Bellotti, supra*, Section 3205 of the Pennsylvania Abortion Control Act expressly states that a physician who violates its provisions "is guilty of 'unprofessional conduct' and his license for the practice of medicine and surgery shall be subject to suspension or revocation." 18 Pa. Cons. Stat. Section 3205(c). Similarly, the failure of any other individual to provide a woman with the requisite information subjects him or her to criminal sanctions. As such, it makes "eminent sense to limit [the physician's and his agent's] obligation to matters within their special competence"—the rendition of medical information and services.

The information required by Section 3205(a)(2) exceeds the traditional obligation to discuss medical risks, and interposes alternatives to abortions. The Act's required recitation of financial assistance and parental support liability information, Section 3205(a)(2)(i) and (ii), injects into the decision-making process factors unrelated to the rendition of medical services or medical risks associated

with abortion. Under the guise of informed consent as a mandate of good medical care, the Act is trying to disseminate information which is not relevant to informed medical consent, and thus, which advances no legitimate State interest. Moreover, compliance may well prompt questions whose answers lie outside the realm of medical expertise and outside the ambit of physical or psychological factors related to abortion. As such, these components of the informed consent provisions can only be viewed as additional, unwarranted burdens on a woman's decision, and thus, attempts to influence the decision itself; these requirements lie outside of legitimate state interests and, consequently, intrude upon a woman's right to a personal and uninfluenced choice to undergo an abortion.

Section 3205(a)(2)(iii) provides an even clearer illustration of the Commonwealth's impermissible efforts to convince pregnant women to choose childbirth over abortion. Pursuant to Section 3205(a)(2)(iii), a woman seeking an abortion must be informed of her right to review certain printed materials that describe the "unborn child" and list agencies which offer alternatives to abortion. Significantly, the Act describes these printed materials in Section 3208, which section is incorporated by reference into Section 3205(a)(2)(iii). Section 3208 requires that the materials include the following statement:

> There are many public and private agencies willing and able to help you carry your child term, and to assist you and your child after your child is born, whether you chose to keep your child or to place her or him for adoption. The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion.

18 Pa. Cons. Stat. Section 3208(a)(1).

Section 3208 further mandates that a woman be provided with an opportunity to review, if she so desires,

> . . . materials designed to inform the woman of the probable anatomical and physical characteristics of the unborn child at two week gestational increments from fertilization to full term, including any relevant information on the possibility of the unborn child's survival.

18 Pa. Cons. Stat. Section 3208(a)(2).

Numerous flaws are readily discernable here. The materials available for review must contain a statement, attributable to the Commonwealth, urging a woman to contact certain agencies prior to finalizing her decision. Clearer evidence of the Commonwealth's efforts to dissuade a woman from pregnancy termination is not often found. In fact, Section 3205(a)(2)(iii) describes these agencies as "alternatives to abortion". Moreover, Section 3208's repeated references in required information to the fetus as an "unborn child" and, in particular, the requirement that the materials contain a statement by the Commonwealth describing the fetus as a "child" evidence the Commonwealth's impermissible efforts to skew a woman's decision in favor of childbirth. Since the fetus is not a person, *Roe v. Wade*, 410 U.S. at 156-158, neither is it a "child". *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd*, *Gerstein v. Poe*, 428 U.S. 901 (1976). Thus, a state may not require that women electing pregnancy termination be told, in effect, that the fetus is a child, since to do so improperly influences choice by state action; *Roe* prohibits promotion of one theory of when life begins, to justify abortions. *Accord*, *City of Akron*, *supra*. (Requirement that patient be told that "the unborn child is a human life from the moment of conception" invalidated.)

Furthermore, although Section 3208 requires that materials detailing the probable anatomical and physiological characteristics of the "unborn child" at two-week gestational increments from fertilization to full-term "be objective, non-judgmental and designed to convey only accurate information about the unborn child

at the various gestational ages," this statutory scheme nonetheless prejudicially impacts on a woman's decision, for several reasons. First, information as to the fetus' physiological characteristics is not directly related to any medically relevant fact *vis-a-vis* the woman, and thus does not advance the need for accurate medical information of risks associated with abortion that defines the limits of informed consent. Rather, as the record reveals, receipt of this information may cause many women seeking abortions emotional distress, anxiety or fear; clearly, it is the impact on women in this stressful situation, rather than on detached readers, against which the information must be measured. (Stipulation of facts, §§109 and 110). Moreover, such effects may be magnified in certain classes of appellees' patients for whom the abortion decision may be inherently more stressful, *e.g.*, those who suffer from such diseases or conditions as diabetes, kidney disease, hemorrhaging or sickle cell anemia, and to whom carrying a pregnancy to term would seriously endanger life or health. (Stipulation of facts, §44.) Lastly, the descriptions required to be made available to a woman encompass all stages of fetal development "at two-week gestational increments from fertilization to full term," rather than merely at the time at which a particular woman seeks an abortion. Thus, Section 3202 mandates that a woman be provided with the opportunity to review clearly irrelevant and potentially misleading information, unrelated to the time at which consent is given by viewing fetal development beyond the point of her own pregnancy.

These aspects of the Pennsylvania Abortion Control Act's informed consent provisions embody, *amicus curiae* maintains, an enforced and, in many instances, medically contraindicated state lecture. Consideration of the factors noted above suggests that the primary import, and indeed the primary purpose, of the required information is not so much factual as it is moral. It is unrelated to maternal medical health but related to the

effort to influence decisions on abortion. See 18 Pa. Cons. Stat. Section 3202(c). To the extent that the state may require that information be made available, it must be neutral and objective; coercive state indoctrination of particular values or ethical judgments is objectionable to First as well as Fourteenth Amendment principles. *Amicus curiae* recognizes that implementation of Section 3208 may not result in descriptions as blatantly offensive as those previously deemed unconstitutional. *See e.g., City of Akron, supra* (Requirement that woman be provided with description of fetal characteristics including appearance, mobility, tactile sensitivity, and brain and heart function, invalidated.) The burdens described above however, flow from the very fact that women desirous of further education regarding abortion alternatives will be subjected to prescribed fetal descriptions; the failure to serve any state interest is equally true of all such descriptions. *Amicus curiae* thus urges this Court to conclude that the only appropriate judicial response to such descriptions is to prohibit them all together.

Appellants argue that the requirement that a woman be made aware of the existence of the Section 3208 materials does not skew her decision, because such a skewing effect can only be produced by the nature of the information provided if she chooses to make use of such materials. Appellants, however, discount the fact that affirmative action is required by the physician or his agent, who must orally advise the patient that materials describing the fetus at various gestational ages and listing agencies which offer alternatives to abortion have been prepared by the Department of Health, and where they may be obtained. To say that the mandate of the statute merely ensures that the materials are available is illusory. The mandated discussion of the availability of materials and the mere discussion of the nature and content of the materials is coercive to freedom of choice since it must entail a description of constitutionally impermissible information. In many cases, depending on

the curiousity of the patient, once informed of the existence of these materials and their basic content, a physician or counselor may feel compelled to offer an evaluation or may be forced to answer any resultant questions, thereby further influencing freedom of choice. For example, if told that the materials describe the "unborn child" a woman may inquire into the nature of the description presented. To answer her question, the physician or counselor must tell her that the materials describe the probable anatomical and physiological characteristics of the "unborn child" at two-week gestational intervals, and discuss the possibility of fetal survival at any given point. As a result, the physician or counselor has directly provided the patient with clearly irrelevant, and perhaps, medically inadvisable, information. Similarly, in response to a patient's inquiry regarding the materials addressed to abortion alternatives, the physician or counselor would be compelled to advise the patient that the materials catalog private and public agencies offering financial assistance and the placement of children through adoption. Thus, a physician or counselor by notifying a woman of the existence and availability of constitutionally impermissible material cannot play a passive role in administering this requirement—that would be inconsistent with his or her professional responsibility.

The egregiousness of Section 3205(a)(2), in practical effect, is underscored by the fact that it preys on the trusting relationship between a woman and the physician or counselor to whom she turns during this stressful and vulnerable period. Although this Court has often emphasized the central role of physicians in the abortion decision, *City of Akron, supra; Colautti v. Franklin, supra,* Section 3205(a)(2) effectively converts the physician or counselor into a spokesperson for the Commonwealth, promoting the Commonwealth's biased

viewpoint, regardless of whether abortion would effectuate the preferred medical judgment in any given case.

Invalidation of Section 3205 will not subvert the Legislature's legitimate policy choice that a woman's decision to terminate her pregnancy be informed. As the record reveals, appellee agencies and physicians encourage adult women to participate in options counseling, and require minors to do so, prior to finalizing their decisions regarding their pregnancies (Stipulation of Facts, §§11, 17, 24 and 95), and require all women desirous of terminating their pregnancies to undergo counseling prior to submitting to an abortion (Stipulation of facts, §§14, 31 and 40). As such, trained professionals and paraprofessionals advise pregnant women of the relative *medical* risks involved and encourage them to discuss their views on, and reservations concerning, abortions (Stipulation of facts, §§13, 20, 21, 22, 31, 38-39). Counselors are alert for women who are hesitant or ambivalent about the abortion decision; women who exhibit such hesitancy or ambivalence are provided with additional counseling, and in some cases, rescheduled for the procedure at a later date.

Thus, a woman who prefers to carry out her pregnancy to term or who is ambivalent or hesitant about which option to pursue can be made aware of the types of services reflected in the available materials, and be afforded an opportunity to review them, if desired. But, a *requirement* that *every* woman be told of the availability for review of materials dealing with alternatives to abortion and describing fetal physiology in detail and which, if described, would expose her to the Commonwealth's strong recommendation urging her to contact financial assistance and adoption agencies, and thus, in effect change her mind, is impermissible. Women who choose the abortion alternative can reasonably be presumed to know that the alternative to abortion is childbirth; it is this knowledge that impels them to seek an abortion in the first place. Similarly, women who elect

to terminate their pregnancies are aware of the procedure's central consequence; the adequacy of a woman's knowledge need not be and should not be gauged solely by the information imparted by a physician or counselor. Insofar as Sections 3205(a)(2) and 3208 require that medically irrelevant information be made available in an unsettling form, they effectuate a blatant intrusion into the decision making process, as the state attempts to influence the ultimate decision. Accordingly, the Court of Appeals for the Third Circuit properly invalidated Sections 3205(a)(2) and 3208.

II. The Pennsylvania Abortion Control Act's "substitute consent" provision impermissibly requires that a parent or guardian be presented with inflammatory information and materials irrelevant to a determination of a minor's best medical interest. Similarly, the procedural rules adopted to implement this provision fail to ensure that consideration be given only to factors medically related to the abortion decision, and that anonymity is maintained. Thus, the Act fails to adequately protect the constitutional right of an unemancipated woman to obtain an abortion.

Section 3206 of the Pennsylvania Abortion Control Act, 18 Pa. Cons. Stat. Section 3206, and the procedural rules adopted to supplement it, suffer from many of the constitutional infirmities discussed in the context of the informed consent provision, 18 Pa. Cons. Stat. Section 3205. In addition, the procedural rules fail to ensure that an unemancipated minor is afforded the privacy and confidentiality constitutionally required. Thus, *amicus curiae* strongly urges this Court to invalidate Section 3206, and to reject Pennsylvania Orphans' Court Rule 16.[5]

[5] *Amicus Curiae* recognizes that no cross-appeal has been filed from that part of the Court of Appeals' decision sustaining, on its face, the validity of Section 3206. Given, however, that a finding by this Court that Section 3206 is unconstitutional would have the same practical effect as the Court of Appeals' decision to enjoin operation of Section 3206, *amicus* respectfully requests this Court to review both Section 3206 and the procedural rules adopted by the Pennsylvania Supreme Court, subsequent to the Court of Appeals' decision in this case.

In *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion), this Court acknowledged the qualitative difference between the abortion decision and other decisions a young woman may be called upon to make during her minority:

> The need to preserve the constitutional right and the unique nature of the abortion decision ... require a State to act with particular sensitivity when it legislates to foster parental involvement in this matter.

Id., at 642. While a State's interest in protecting immature minors will, then, sustain a requirement of a "consent substitute", *e.g.* a parent, the State must also establish an alternate confidential procedure whereby an unemancipated minor will have the opportunity to fairly demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests. *City of Akron*, *supra*, at _____; *Bellotti v. Baird*, *supra*, at 643-644.

A "consent substitute" may not, however, be presented with biased and irrelevant information to which the pregnant woman herself may not constitutionally be exposed, *amicus* maintains—otherwise the "substitute" is not really a substitute. Although a parent, for example, is less directly affected by the abortion decision than is the young woman herself, a state may determine that the decision's effect on family stability and the parental role in child-rearing justify parental intervention. *Bellotti v. Baird*, *supra*. A state is thus permitted to conclude, implicitly, that, apart from the physical aspect, the abortion decision impacts as greatly on the minor woman's family as it does on her. Concomitantly, *amicus curiae* contends, it may not constitutionally be said that the abortion decision impacts *more* on the woman's family than on the pregnant woman. As such, factors constitutionally irrelevant to the abortion decision if left

solely to the pregnant minor are also constitutionally irrelevant to any decision made by a "consent substitute."

Section 3206(a) of the Pennsylvania Abortion Control Act requires that, where an unemancipated minor seeks parental consent to an abortion, the parent must be provided with "the information *and materials specified in Section 3205.*" (Emphasis added). Significantly, Section 3206(a)'s reference to Section 3205 is not limited to Section 3205(a)(i), *i.e.*, the medical risks to treatment. Rather, Section 3206 refers to Section 3205 in its entirety, thereby encompassing Section 3205(a)(2), and the Section 3208 materials. Moreover, while amicus has argued that, in effect, Section 3205(a)(2) guarantees that a woman be told of the nature and basic content of the materials mandated by Section 3208, Section 3206(a) *expressly* requires that the parent be provided with these irrelevant and highly inflammatory materials *themselves.* Thus, while a pregnant woman herself may elect to forego review of the actual materials as prepared by the Department of Health, the physician may not afford the parent a similar option.

In addition, although Section 3205 permits the provision of at least some of the information legislatively deemed necessary to informed consent by the physician or his agent, Section 3206 requires a *physician* to provide the parent with the information *and materials* detailed in Sections 3205 and 3208.

The *requirement* that the parent whose consent to an abortion upon a minor woman is sought, be provided with biased information, irrelevant to the medical abortion decision and which a state may not require to be provided to the pregnant woman herself, must be characterized as a blatant effort by the Commonwealth to influence the decision.

An unemancipated woman may choose, for whatever reason, not to seek parental consent to an abortion. In such cases, resort may be made to the judiciary. Section

3206(c) authorizes the filing of a petition to the Court of Common Pleas in the county in which the woman resides or in which the abortion is sought. Section 3206(c) further directs that an "appropriate" hearing be held, after which the Court, upon a finding that the woman is mature and capable of consenting to the abortion, and has consented, must authorize the performance of an abortion. If, however, the Court finds that the woman is incapable of giving informed consent, or the women does not claim to be sufficiently mature, the Court must determine whether the abortion would serve the woman's best interests, and if so, must authorize the procedure. 18 Pa. Cons. Stat. Section 3206(d).

Section 3206(d) thus requires the Pennsylvania judiciary to intrude into the realm of medical advisability and decision-making traditionally restricted to those individuals licensed to practice medicine in this Commonwealth. Regardless of the decision eventually reached, Section 3206(d) requires a judge, in prescribed circumstances, to independently assess the determination of medical necessity already made by the minor woman's own physician and to perhaps second-guess a medical decision of the person best educated and informed to make such decisions. *See* 18 Pa. Cons. Stat. Section 3204 (No abortion shall be performed but upon a finding that the procedure is necessary.) Although this Court has often acknowledged the pivotal role played by the physician in the abortion decision, *See, e.g., Colautti v. Franklin, supra*, Section 3206(d) permits an individual untrained in medicine to discount, or even reject, the physician's best professional judgment, in his effort to ascertain the minor's "best interests"—a concept incapable of precise definition and whose use in the context of restricting a minor's exercise of a unique, fundamental right is impermissible.

The procedural rules adopted to implement Section 3206 do not cure its deficiencies but, rather, add to them. Noteworthy here is Pennsylvania Orphans' Court Rule

16.5. Rule 16.5 directs the Court, at a hearing held pursuant to Section 3206(c), to hear evidence related to the young woman's emotional development, maturity, intellect and understanding, her pregnancy, possible consequences and alternatives to the abortion, and "any other evidence that the Court may find useful" to its determination. Significantly, the Court's solicitation of additional "useful" information is not limited to relevant physical or psychological factors impacting on the decision. Rather, under the aegis of "usefulness", a court conceivably could consider, for example, parental objections based on religious views.[6] While this Court has approved a prohibition of consideration of parental objections, *Bellotti v. Baird, supra*, at 644, neither Section 3206 nor the rules designed to implement it contain such a prohibition.

Finally, while Section 3206 pays lip-service to the confidentiality requirement enunciated in *Bellotti v. Baird, supra*, 18 Pa. Cons. Stat. Section 3206(f), the procedures implemented by the Pennsylvania Supreme Court are woefully inadequate for the preservation of a young woman's privacy. All petitions seeking authorization for an abortion must include the minor's initials, the name and addresses of her parents, and her signature. Pennsylvania Orphans' Court Rules 16.2(a)(1)(3) and (7). While anonymity may be preserved by the use of a minor's initials on the petition, *Planned Parenthood, Kansas City, Mo. v. Ashcroft*, at n. 16, the required inclusion of names and addresses of parents, and of the minor's own signature, nullifies efforts to protect her identity.

Furthermore, while the Act permits an unemancipated minor to seek judicial authorization of an abortion without consulting with her parent, 18 Pa. Cons. Stat. Section 3206(c), Rule 16.4 states, in part:

> All persons shall be excluded from the hearings *except* the applicant, *her parents or persons*

[6] As discussed further below, a parent may not be excluded from a Section 3206(c) hearing.

> *standing in loco parentis*, and such other person's whose presence is specifically requested by the applicant or her guardian.

Pennsylvania Orphans' Court Rule 16.4 (emphasis added). Thus, even if a minor elects not to inform her parents of her pregnancy, one or both may, upon so learning through whatever means, attend the hearing, notwithstanding any objections voiced by their daughter. In addition, the Court could conceivably deem "useful" any comments that the parent or parents might wish to make.

A parent may not be given a veto power over the decision of an unemancipated daughter to terminate her pregnancy. *Danforth, supra.* While on its face Section 3206 does not conflict with this constitutional principle, the rules adopted to implement the statute achieve the same effect by (1) permitting parental attendance, even where the minor has chosen not to notify her parents of her decision, and (2) failing to prohibit the solicitation of parental comments regarding the decision if deemed "useful". As Sections 3206 and Orphans' Court Rule 16 thus inadequately preserve a minor's fundamental, albeit limited, right to an abortion, *amicus curiae* urges this Honorable Court to invalidate Section 3206, and to reject Pennsylvania Orphans' Court Rule 16.

III. The Court of Appeals for the Third Circuit properly invalidated Section 3210(b), given that a woman may not constitutionally be required to bear an increased medical risk in order to preserve the life of a viable fetus.

Any abortion currently performed in Pennsylvania upon a viable fetus must be performed in the manner most likely to result in fetal survival "unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman." 18 Pa. Cons. Stat. Section 3210(b). This requirement, *amicus*

curiae maintains, impermissibly places priority on the life of the fetus over the health of a pregnant woman, and thus, was properly invalidated.

In 1979, this Court struck down the prior standard-of-care provision applicable to post-viability abortions in Pennsylvania. *Colautti v. Franklin, supra.* Requiring that a physician employ the abortion technique most likely to result in a live birth "so long as a different technique would not be necessary in order to preserve the life or health of the mother," the earlier statute was invalidated on the basis of its inherent ambiguity. As the court remarked,

> [It] is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount or his duty to the fetus, or whether it requires the physician to make a "trade-off" between the woman's health and . . . fetal survival. Serious ethical and constitutional difficulties . . . lurk behind this ambiguity.

Id., at 400.

The constitutional difficulties alluded to by the *Colautti* Court stem, *amicus curiae* maintains, from the conclusion implicit in *Roe v. Wade, supra:* even post-viability, a woman may not be forced to endure an increased health risk, for the sake of the fetus. The instant statutory scheme, however, imposes such a requirement, and thus, is unconstitutional.

Section 3210(b) requires a physician to determine prior to aborting a viable fetus, which of the available methods or techniques will present the best chance for fetal survival. Use of that particular method is then statutorily prescribed, except in those instances where its use would pose a "significantly greater" medical risk to the life or health of the mother than would another available method. The phrase "significantly greater" thus presumes that there may be abortion methods for use post-viability which will increase the risk to maternal

health, but whose use will not rise to the level of a "significantly greater" medical risk. To illustrate: There may be five abortion techniques available, two of which are unsuitable for post-viability abortions, given the advanced state of the pregnancy. The remaining three methods may present varying degrees of medical risk to the woman. If none of the available methods would present a "significantly greater" health risk to the woman, the physician must, under threat of criminal sanction, choose from the three available methods the one most likely to preserve fetal life or health, notwithstanding the availability of an alternate method which would present less risk to the pregnant woman. Thus, the method best calculated to save the fetus may not be the method of least medical risk to the woman. Although the Constitution does not permit a requirement that an abortion be performed by other than the method of least risk to the woman, Section 3210(b) of the Pennsylvania Abortion Control Act imposes such a requirement, and thus is unconstitutional.

The prominent place reserved to fetal life by the Act is further evidenced by the fact that, in assessing the risk presented by any given pregnancy termination procedure, the woman's physician specifically may not consider the potential psychological or emotional impact on the woman of fetal survival. Although this Court has required that a physician consider factors other than physical health in determining whether an abortion is necessary, *Doe v. Bolton*, 410 U.S. 179, *reh. denied*, 410 U.S. 979 (1973); *United States v. Vuitch*, 402 U.S. 62 (1971), and indeed, the Pennsylvania statute expressly so provides, 18 Pa. Cons. Stat. Section 3204, consideration of emotional, psychological and familial aspects is suspended when the physician decides upon the appropriate method of abortion, post-viability. Section 3210(b) is thus analogous to the Nebraska requirement that a post-viability abortion be performed in a manner compatible with protecting the woman from "an

imminent peril that substantially endangers her life or health" invalidated in *Schulte v. Douglas*, 567 F. Supp. 522 (D. Neb. 1981). Recognizing that a state may regulate post-viability abortions, the District Court nonetheless invalidated Nebraska Criminal Code Section 28-330, noting that the legislature's inclusion of the qualifying language rendered Section 28-330 unconstitutionally underinclusive. *See also Margaret S. v. Edward*, 488 F. Supp. 181 (E.D. La. 1980) (Louisiana statute permitting post-viability abortions only if necessary to prevent "permanent impairment" of a woman's health deemed unconstitutional.)

Similarly, Section 3210(b) impermissibly interferes with medical judgments by dictating a particular course of action, even when, in the physician's judgment, a different course should be taken to protect the woman from an increased health risk. This course of action a state has no authority to require. Consequently, the judgment of the Court of Appeals for the Third Circuit invalidating Section 3210(b) should be affirmed.

IV. The Court of Appeals for the Third Circuit properly invalidated the Act's "second-physician" requirement, given the absence of an exception for emergencies.

As noted above, the Pennsylvania statutory scheme requires physicians who perform abortions on fetuses determined to be viable to employ the abortion technique most likely to preserve fetal life, provided that use of that technique does not present a significantly greater medical risk to the life or health of the pregnant woman. 18 Pa. Cons. Stat. Section 3210(b). The statute also directs that in such cases, and in any other cases in which the method chosen does not preclude the possibility of fetal survival, the attending physician arrange for the attendance of a second physician. The second physician is required, immediately upon completion of the abortion procedure, to take control of

the child and provide him or her with all medical care reasonably necessary to preserve the child's life and health. 18 Pa. Cons. Stat. Section 3210(c).[7]

In reviewing a similar provision, five members of this Court upheld a second-physician requirement that could be interpreted as containing an exception for emergencies, during which the delay inherent in arranging for the presence of a second physician could adversely affect the pregnant woman's life or health. *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft, supra.* Although the statute reviewed in *Ashcroft* did not expressly contain a medical emergency exception, such a construction was permissible, the Court concluded, by virtue of the statutory qualifying language; the second physician was compelled to "take all reasonable steps in keeping with good medical practice . . . to preserve the life or health of the viable unborn child, provided that it [did] not pose an increased risk to the life or health of the woman." *Id.*, _____ U.S. _____, 103 S.Ct. at 2522, n.8.[8]

Section 3210(c) of the Pennsylvania Abortion Control Act is, however, completely devoid of any references to maternal life or health, or to a medical emergency, as statutorily defined. 18 Pa. Cons. Stat. Section 3203. Nor does the statute permit a finding that the Legislature intended the clause in Section 3210(a), which provides a

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[7] The requirement that the attending physician, *in all cases* where the abortion method chosen does not preclude the possibility of a live birth, arrange for the attendance of a second physician, is further evidence that a woman may be required to subject herself to additional health risks apart from those inherent in the abortion decision itself, in the interest of fetal survival.

[8] *Amicus curiae* respectfully suggests that this Court's perception of an "emergency exception" in the Missouri Statute scrutinized in *Ashcroft* was misplaced, in that the above-quoted language referred to the responsibility of the second physician to the *fetus*, and not to the responsibility of the attending physician in arranging for the presence of a second physician.

defense for abortions performed on non-viable fetuses, or necessary to preserve maternal life or health, to be equally applicable to Section 3210(c). While Section 3210(a) states that these circumstances shall be a complete defense to any charge brought against a physician for violating the requirements of *this section*, *amicus curiae* contends that analysis of Section 3210 in its entirety undermines the conclusion that "this section" also refers to Sections 3210(b) and (c). Initially, *amicus curiae* notes that extension of these defenses to Section 3210(b) would be absurd. Section 3210(b) by its terms assumes viability, and thus contains a limited defense peculiar to that particular section: the physician's good faith judgment that use of the method most consistent with preservation of fetal life or health presented a significantly greater medical risk to the life or health of the pregnant woman than did the method actually used. Moreover, the maternal life and health "defense" within Section 3210(b) is itself more narrowly defined than that deemed permissible in the context of prohibiting abortions totally during the last trimester of a pregnancy. Given that the legislature will not be presumed to have intended an absurd result, *United States v. Turkette*, 452 U.S. 576, 580 (1981), the defenses contained within Section 3210(a) cannot be viewed as applicable to Section 3210(b). Appellants' argument that these defenses are similarly applicable to Section 3210(c), relying as it does solely on this expansive concept of the term "section", must thus fail.

Absent more explicit emergency situation language, *amicus* must suggest that the Court of Appeals for the Third Circuit properly invalidated Section 3210(b) of the Pennsylvania Abortion Control Act.

Conclusion

A State has a legitimate interest in the health of a pregnant woman, and in the potential life represented by the fetus. As such, a State may impose carefully-tailored restrictions on the procurement of an abortion, designed to advance these health interests. However, a statutory scheme which (1) requires that information and materials outside the scope of medical expertise and advisability and thus designed solely to promote, in a non-neutral fashion, a policy preference for childbirth over abortion, be presented to a woman desirous of an abortion or her parent, if she is unemancipated; (2) in the interest of preservation of fetal life, requires a woman who elects to terminate her pregnancy after the point of viability to submit to a procedure that does not present the least medical risk to her health, and (3) requires the presence of a second physician, with responsibility solely to the fetus, at *all* abortions performed post viability, exceeds legitimate state concerns, by unduly interfering with the physician-patient relationship and attempting to directly influence the abortion decision. The Pennsylvania Abortion Control Act is such a statutory scheme. Accordingly, *amicus curiae* respectfully urges this Honorable Court to affirm the judgment of the Court of Appeals for the Third Circuit entered in the instant case.

Respectfully submitted,

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Certificate of Service

I, ROBERT T. CROTHERS, a member of the Bar of the Supreme Court of the United States, am counsel of record for the National Family Planning and Reproductive Health Association, Inc., *amicus curiae* herein. I hereby certify that on August 30, 1985, pursuant to Rule 28.5(b), Rules of the Supreme Court, I served a copy of the foregoing brief on each of the parties herein, as follows:

On Richard Thornburgh, H. Arnold Muller, Helen B. O'Bannon, Michael J. Browne, William J. Davis, LeRoy S. Zimmerman, and Joseph A. Smyth, Jr., Appellants, by depositing such copy in the United States Post Office, Washington, Pennsylvania, with first class postage prepaid, properly addressed to Andrew S. Gordon, the above-named Appellants, counsel of record, at the Office of the Attorney General, 15th Floor, Strawberry Square, Harrisburg, Pennsylvania, 17120.

On the American College of Obstetricians and Gynecologists, Pennsylvania Section, Henry H. Fetterman, M.D., Thomas Allen, M.D., Francis L. Hutchins, Jr., M.D., Allen J. Kline, D.O., Brooks R. Susman, Paul Washington, Morgan P. Plant, Elizabeth Blackwell Health Center for Women, Planned Parenthood of Southeastern Pennsylvania, Reproductive Health and Counseling Center, and Women's Health Services, Inc., Appellees herein, by depositing such copy in the United States Post Office, Washington, Pennsylvania, with first class postage prepaid, properly addressed to Thomas E. Zemaitis, the above-named Appellees' counsel of record, at Suite 2001, the Fidelity Building, Philadelphia, Pennsylvania, 19109.

All parties required to be served have been served.

Dated: August 30, 1985

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No. 84-495

In the Supreme Court of the United States
October Term, 1984

Richard Thornburgh, H. Arnold Muller, Helen B. O'Bannon, Michael I. Browne, William R. Davis, LeRoy S. Zimmerman, personally and in their official capacities, and Joseph A. Smyth, Jr., personally and in his official capacity, together with all others similarly situated,

Appellants

v.

American College of Obstetricians and Gynecologists, Pennsylvania Section, Henry H. Fetterman, M.D., Thomas Allen, M.D., and Francis L. Hutchins, Jr., M.D. on behalf of themselves and all others similarly situated; Allen J. Kline, D. O., on behalf of himself and all others similarly situated; Brooks R. Susman, Paul Washington; Morgan P. Plant, on behalf of herself and all others similarly situated; Elizabeth Blackwell Health Center for Women, Planned Parenthood of Southeastern Pennsylvania; Reproductive Health and Counseling Center; and Women's Health Services., Inc.,

Appellees

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In the Supreme Court of the United States
October Term, 1985

No. 84-495

Richard Thornburgh, et al., Appellants

v.

American College of Obstetricians and Gynecologists, et al., Appellees

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No. 84-1379

Eugene F. Diamond, et al., Appellants

v.

Allan G. Charles, et al., Appellees

On Appeal From the United States Courts of Appeals for the Third and Seventh Circuits

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Brief for an Ad Hoc Group of Law Professors As Amici Curiae in Support of Appellees

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CONSENT OF PARTIES

Amici curiae file this brief with the consent of all the parties in support of the position advanced by the appellees.

INTEREST OF AMICI CURIAE

Amici Curiae are the individuals listed who compose an ad hoc group of professors teaching at various American law schools. The group represents a cross section of views and diverse interests. Amici all recognize the importance and emotional timbre of the issues raised in this case. They, however, believe that these issues should not be resolved at the expense of impugning the integrity of the federal judicial process simply because of the zealousness and fervor surrounding their public debate. Amici recognize and support the logical and orderly procedural flow of litigation, as well as adherence to constitutional requirements for the exercise of appellate jurisdiction. Amici, therefore, urge this Court to dismiss these cases for lack of jurisdiction.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than a decade has passed since this Court's land-mark decision in Roe v. Wade, 410 U.S. 113 (1973) (hereafter Roe) articulated the fundamental constitutional protection of a woman's right to obtain an abortion. In the intervening years, this Court consistently has reaffirmed its position in a succession of cases challenging the practical application of the tenets of Roe.[1] These two cases once more appear to question this Court's strength of conviction in its interpretation of Roe in several

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[1] See Connecticut v. Menillo, 423 U.S. 9 (1975); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Poe, 432 U.S. 464 (1977); Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979); Harris v. McRae, 448 U.S. 297 (1980); H.L. v. Matheson, 450 U.S. 398 (1981).

recent similar decisions.[2] This appearance, however, is deceptive and illusionary. Both of these cases are improperly before this Court. Appellants have failed to satisfy fundamental requirements necessary for the exercise of appellate jurisdiction by this Court.

In Thornburgh, appellants, in their zeal, seek to disrupt the logical and orderly procedural flow of litigation by having this Court abandon the century long practice of restricting review on appeal from a Circuit Court of Appeals decision to only those cases involving final judgements. In addition, because of intervening circumstances, that specific part of the appeal seeking review of the Parental Consent/Judicial Approval provi-

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2/ Planned Parenthood Association v. Ashcroft, 462 U.S. 476 (1983); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983).

sions, §3206 of the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat. Am. §§3201-3220 (Purdon 1983) (hereafter the "Pennsylvania Act") presently is moot as a matter of appellate review and ripe for review by the District Court.

Similarly, in Diamond, there is no live case or controversy for the exercise of federal judicial power. Appellants, District Court intervenors, lack the requisite standing necessary to bring the case to this Court. The District Court order granting appellants the right to intervene in the first place is not dispositive of whether they now have standing. None of the originally named party-defendants, governmental officials representing the State of Illinois, have filed an appeal or adopted appellants' brief in this case. In fact, all of the state representatives have been realigned as appellees in the case before this Court.

I. TRADITIONAL PRINCIPLES OF FINALITY OF JUDGMENTS REQUIRE DISMISSAL OF THE APPEAL UNDER 28 U.S.C. §1254(2) OF PART OF AN INTERLOCUTORY ORDER ISSUED BY THE CIRCUIT COURT OF APPEALS IN THORNBURGH

This case was brought to the Circuit Court of Appeals on cross-appeals from a District Court order, entered on a hastily stipulated record, denying a substantial, but not total, part of plaintiff's request for a preliminary injunction of the Pennsylvania Act. The case was twice briefed, as well as orally argued. In between, this Court announced its decisions in three factually similar cases, Planned Parenthood Association v. Ashcroft, 462 U.S. 476 (1983), Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)and Simopoulos v. Virginia, 462 U.S. 506 (1983). After thoughtful and methodical consideration, the Circuit Court of Appeals finally concluded that certain

sections of the Pennsylania Act were unconstitutional as a matter of law as written. The original denial of the preliminary injunction was reversed in part and the case was remanded to the District Court "for further proceedings in accordance with [its] opinion." American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 304 (3rd Cir. 1984). Judgement was not entered for the plaintiffs. Significant parts of the Pennsylvania Act still require District Court review during which both plaintiffs and defendants may engage actively in trial litigation by offering additional evidence and legal arguments. The Commonwealth of Pennsylvania has not appealed certain issues but reserved them for further litigation before the Distict Court. (E.g. §3205(a)(2) of the Pennsylvania Act.) Since the Circuit Court of Appeal's order, plain-

tiffs have renewed their motion before the District Court for a preliminary injunction of additional provisions of the Pennsylvania Act. A full evidentiary hearing has been held and a final hearing on the merits should be scheduled shortly. The District Court decision on these and other matters undoubtedly will be appealed to the Circuit Court of Appeals and, probably, to this Court, as well.

The complicated and fragmented procedural posture of the case, argues in persuasive decibels, that the interlocutory order of the Circuit Court of Appeals clearly lacks the degree of finality required for the exercise by this Court of mandatory appellate jurisdiction under 28 U.S.C. §1254(2) (hereafter §1254(2)).

This Court consistently has required that appeals can be taken only from final judgments of the Circuit Court of Appeals to the United States Supreme Court.

> Under the Act of February 13, 1925 [the Amended Judicial Code of 1925], §240(b) [the predecessor to §1254(2)] appeals to this Court from Circuit Court of Appeals lie only from final judgments or decrees in cases where the validity of a state statute is drawn in question on the ground of repugnance to the Constitution, treaties, or laws of the United States, and the decision is against its validity. (citations omitted)

Slaker v. O'Conner, 278 U.S. 188, 189-190 (1929). This finality requirement was read directly into §1254(2) in South Carolina Electric and Gas Co. v. Flemming, 351 U.S. 901 (1956) (per curiam). Neither case has been overruled and clearly are controlling precedent here.[3]

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[3]/ Neither New Orleans v. Dukes, 427 U.S. 297 (1976), Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), El Paso v. Simmons, 379 U.S. 497 (1964) (per curiam) nor Chicago v. Atchison, T. & S.F.R. Co., 357 U.S. 77 (1958), reached the merits of the issue presently before the court. In any event, all four cases are factually distinguishable.

It is neither surprising nor confusing that §240(b) of the amended Judicial Code of 1925 and 28 U.S.C. §1254(2) contain no explicit finality language. The final judgement requirement within the federal court system finds its historical roots in the practice of the common law in the courts of England[4] and in the first Judiciary Act of 1789, 1 Stat. 73, c. 20 §22. Finality has been deemed a longstanding rule of procedural practice implicit in all prior acts of Congress, equally silent in their terms on this matter, related to United States Supreme Court appellate jurisdiction. See generally, Crick, The Final Judgement as a Basis for Appeal, 41 Yale L.J. 539 (1932). When the

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4/E.g. Metcalfe's Case, 77 Eng. Rep. 1193 (K.B. 1615); U.S. v. Girault, 52 U.S. 22 (1850); Holcombe v. McKusick, 61 U.S. 552 (1857).

Circuit Courts of Appeal were created by the Evarts Act of March 3, 1891, 26 Stat. 826, this Court reaffirmed in clear and unmistakable terms the applicability of the final judgement requirement for access to the United States Supreme Court by appeal.

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error,... have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. Forgay v. Conrad, 6 How. 201, 204. The Construction [of non-finality] contended for would render the act under consideration inconsistent with this long established object and policy. More than this, it would defeat the very object for which that act was passed. . . .
> . . .[T]he distribution of the entire appellate jurisdiction of our national judi ial system, between the Supreme Court of the United States and the Circuit Court of Appeals, . . . by designating the classes of cases in respect of which each of those two courts

shall respectively have final jurisdiction. . . . [T]here is, we think, no provision in the act which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of Federal courts as to extend the jurisdiction of the Supreme Court to the review of jurisdictional cases in advance of the final judgments upon them.

But there is an additional reason why the omission of the word final . . . should not be held to imply that the purpose of the act is to extend the right of appeal to any question of jurisdiction, in advance of the final judgment, at any time it may arise in the progress of the cause in the court below. Such implication, if tenable, cannot be restricted to questions of jurisdiction alone. It applies equally to cases that involve the construction or application of the Constitution of the United States; and to cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; and to those in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Under such a construction all these most important classes of cases could be directly taken by writ of error or appeal, ... to this court, independently of any final judgment upon them. The

> effect of such a construction, if sanctioned, would subject this court to the needless delays and labor of several successive appeals in the same case, which, ... by awaiting the final judgment, could be promptly decided in one appeal.

McLish v. Roff, 141 U.S.661,665-667 (1891).

§1254(2), as originally enacted as §240(b), was an amendment to the Judge's Bill of 1925 drafted by Justices deeply concerned about the U.S. Supreme Court's caseload. John Simpson, Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court, 6 Hastings Const. L.Q. 297, 299 n.7 (Fall, 1978), James F. Blumstein, The Supreme Court's Jurisdiction - Reform Proposals, Discretionary Review, and Writ Dismissals, 26 Vand. L. Rev. 895, 898-899 (1973); F. Frankfurter and J. Landis, The Business of the Supreme Court, 273-278 (Johnson Reprint Corp., N.Y. 1972). §240(b) was a Senate compromise measure designed to place circuit courts of

appeal and state courts, pursuant to §237(a), 43 Stat. 937 (now 28 U.S.C. §1257(a)), in "perfect parity, allowing a writ error from the circuit court of appeals under conditions exactly the same, except reversed, and allowing a writ of certiorari in the one case as in the other case, so that the two would be entirely harmonious." Frankfurter and Landis, supra. at 278 (citing Sen. Walsh, 66 Cong. Rec. 2923); see also Simpson, supra. at 313. While §237(a), directed to state courts with varying appellate practices, explicitly required finality, §240(b) merely reflected codification of historical federal court practice.[5]

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[5]/ This comparison is not intended to imply any other similarity of requirements under these statutes.

The finality requirement, for some time, has served as one of a number of measures aimed at relieving the burden of the Supreme Court caseload by reducing the number of cases requiring mandatory appellate review. Congressional policy has been to restrict the mandatory appellate jurisdiction of the U.S. Supreme Court.[6] This Court has recognized

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6/ The Evarts Act, Act of March 3, 1891, 26 Stat. 826, established the federal Circuit Courts of Appeal and U.S. Supreme Court certiorari authority over certain cases. The Act of September 6, 1916 Ch. 448, 39 Stat. 726, provided a right of appeal to the U.S. Supreme Court from state court only where a federal statute, treaty, authority or right was struck down or a state statute upheld against federal challenge. The Act of February 13, 1925, Ch. 229, 43 Stat. 936, the Judge's Bill of 1925, widely substituted certiorari review for a significant part of U.S. Supreme Court mandatory appellate jurisdiction. The Act of August 12, 1976, 90 Stat. 1120, by repealing 28 U.S.C. §§ 2281, 2282 and 2403, abolished direct appeals to the United States Supreme Court from most three-judge district courts.